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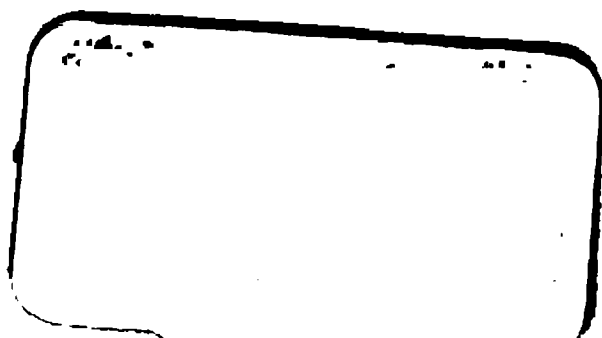
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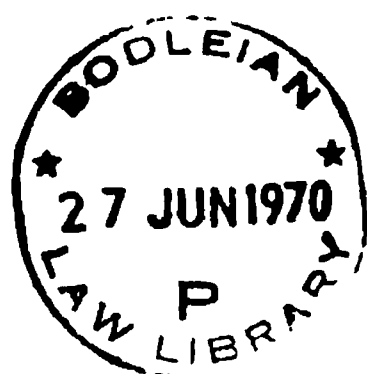
IN THE

COURT OF SESSION, &c.

REPORTS
OF CERTAIN
REMARKABLE CASES
IN THE
COURT OF SESSION,
AND
TRIALS
IN THE
HIGH COURT OF JUSTICIARY.

BY WILLIAM BUCHANAN, ESQ. ADVOCATE.

EDINBURGH :
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1813.



ADVERTISEMENT.

SOME years ago, the Author having occasion, in the course of his professional duty, to take notes of the opinions of the Judges of our Supreme Courts, in several of the following cases, was led to think, from the advantages in point of fulness and accuracy which the habit of writing shorthand afforded, that the publication of these opinions, with Reports of the Cases, might not be unacceptable, either to the Profession, or perhaps, in some instances, to the general reader. With this view, he proceeded to enlarge his matter, by the addition of the most important cases, from time to time, as they happened to occur ; selecting chiefly such as, being rather of a popular nature, might have an interest beyond what mere technical questions can ever possess ; and adding, for the same reason, the Trials and other proceedings before the High Court of Justiciary. The whole is now offered as a specimen of what the Author may probably continue, if the present attempt should meet with the public approbation.

Edinburgh, July 7, 1813.

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CASES
IN THE
COURT OF SESSION.


THE CASE

OF

JOHN ANDREW, SHOEMAKER IN MAYBOLE,

AGAINST

JOHN MURDOCH, SHERIFF-SUBSTITUTE OF AYRSHIRE.

In the village of Maybole in Ayrshire, a society of Free- 1800.
Masons had existed for some time previous to the year 1800, 
under the name of the Royal Arch Lodge. In the course
of that year, certain reports were circulated of a nature very
unfavourable to the character of this association; the mem-
bers of which, it was said, made use of the profession of
Free-Masonry merely as a cover for principles hostile to the
government and religion of the country. Some such state-
ments having attracted the notice of the Procurator-fiscal for
the county of Ayr, he was induced to present a petition to
Mr John Murdoch, Sheriff-substitute of that county, charg-
ing John Andrew, shoemaker, and Robert Ramsay, cart-
wright, both in Maybole, members of the Mason Lodge,

♠

1800. with sedition, and with administering unlawful oaths ; and praying for a warrant to apprehend them, and certain other persons, in order that inquiry might be made into the facts.

Upon the 28th of June, the Sheriff-substitute granted a warrant to this purpose ; in consequence of which, upon the 30th, Andrew and Ramsay were both apprehended at Maybole, and underwent an examination before him. Three other persons were also examined ; and, upon closing the inquiry, Andrew and Ramsay were both marched, under a military guard, to the town of Ayr, by virtue of the following warrant, granted at the time, and sent along with them :

‘ Maybole, 30th June, 1800.

‘ GENTLEMEN,

*‘ You will please receive and detain in
‘ your tolbooth, the persons of John Andrew, shoemaker,
‘ and Robert Ramsay, cartwright, both in Maybole, ac-
‘ cused of seditious practices, until they shall be liberated
‘ in due course of law ;—for which this shall be your war-
‘ rant. And you are requested to put these two persons in-
‘ to separate apartments in your jail, that they may have
‘ no communication with each other, nor with any other
‘ person without your liberty.—I am, GENTLEMEN,*

Your most obedient servant,

(Signed) JOHN MURDOCH.

*‘ To the Hon. the Magistrates of Ayr, }
‘ and Keepers of their Tolbooth.’ }*

Under the authority of this warrant these persons were lodged in the tolbooth of Ayr, and their imprisonment is recorded as follows in the town books :

Ayr, 30th June, 1800. 1800.

‘ Then the persons of John Andrew, shoemaker, and
 ‘ Robert Ramsay, cartwright, both in Maybole, were in-
 ‘ carcerated in Ayr tolbooth, as being accused of seditious
 ‘ practices, therein to remain until liberate in due course of
 ‘ law, in terms of a warrant granted by John Murdoch,
 ‘ Esq. Sheriff-substitute of Ayrshire, as the same, lodged
 ‘ among the town records, bears.—Extracted from the re-
 ‘ cord of incarcerations, liberations, &c. kept within the
 ‘ burgh of Ayr, at Ayr, the 7th February, 1801, by

(Signed) DAVID LEMOND, *Town-Clerk.*’

It has been said, that the proper warrant of commitment granted by the Sheriff upon this occasion, was not the warrant, or letter, to the Magistrates of Ayr, but a writing annexed to the precognition of the following tenor:

Eodem die.

‘ The Sheriff having considered the foregoing declara-
 ‘ tions of John Andrew and Robert Ramsay, also emitted
 ‘ before him this day, he grants warrant to
 ‘ officers, and other assistants,
 ‘ to apprehend the persons of the said John Andrew and
 ‘ Robert Ramsay, and to carry them to, and incarcerate
 ‘ them within, the tolbooth of Ayr, therein to remain until
 ‘ they shall be farther examined anent the crimes of which
 ‘ they are accused; and grants warrant to the Magistrates
 ‘ of Ayr, and keepers of their tolbooth, to receive and de-
 ‘ tain them accordingly.’

Whether this writing was in reality annexed to the recognition at the time is not exactly known; but it is quite

1800. certain, that it never was communicated to the parties, nor transmitted to the Magistrates of Ayr, whose only authority for detaining the prisoners was the warrant, or letter, of the 30th June, directing them to be confined until liberated in due course of law. The imprisonment was recorded in terms of that warrant; and, in compliance with its other injunctions, the parties were confined in separate apartments, denied the use of pen and ink, and interdicted from all communication with each other, or with their friends.

Upon the 2d of July, they presented petitions to Mr Murdoch, praying to be admitted to bail, to the extent of any sum he himself might be pleased to fix. But as he had transmitted the precognition to the Crown Counsel for their directions, he refused, or delayed, to give answer to these applications until the 9th of July, when he made the following order upon each of their petitions: ‘ In regard the
‘ petitioner is only incarcerated until farther examination,
‘ and that the precognition taken against him is transmitted to the crown lawyers, he delays giving any deliverance upon the petition.’

In the mean time the prisoners were kept in close confinement until the 12th of July, when Mr Murdoch gave judgment upon their petitions as follows: ‘ Having heard
‘ from the King’s Counsel, and having considered the foregoing petition, finds the crimes for which the petitioner
‘ is incarcerated are bailable, and allows him to find sufficient caution acted in the Sheriff-court books of Ayr,
‘ that he shall answer to any prosecution to be brought
‘ against him for the alleged crimes, mentioned in the petition, at any time within six months from the date of the
‘ bail-bond, to be granted for that purpose, and that under
‘ the penalty of L. 60 sterling; and, upon his finding such
‘ caution, ordains him to be liberated from prison.’

The prisoners immediately found bail, and were liberated 1800. the same day. They were afterwards tried at the Circuit Court held at Ayr, in autumn 1800, upon the charge of administering unlawful oaths, and acquitted by an unanimous verdict of the jury. The prisoner Andrew, then brought an action of wrongous imprisonment against Mr Murdoch, concluding for the penalties fixed by the act 1701, or, at least, for damages on account of oppression at common law. The action was founded upon the following clause of the statute: ‘ That it shall be lawful for the prisoner, or person ordered to be imprisoned, to apply to the committer, or Commissioners of Justiciary, or other Judge competent, for cognition of the crime, and offer to find caution, that the said prisoner, or person ordered to be imprisoned, shall appear and answer to any libel that shall be offered against him, for the crime or offence wherewith he is charged, at any time within the space of six months, and that under such a penalty as the said committer, or the Lords of Justiciary, or other Judge competent, shall modify and appoint; and that, upon the said application, the said committer or Lords of Justiciary, or other Judge competent, shall first cognosce whether the crime be capital or not, in order to the finding bail allenarly, and, ifailable, that he or they shall be obliged to modify the sum for which the bail is to be found, *within twenty-four hours after the said petition is presented to him or them respectively*; the sum for which bail is to be found not exceeding 6000 merks for a nobleman; 3000 for a landed gentleman; 1000 for any other gentleman and burgess; and 300 for every other inferior person;—under pain of wrongous imprisonment.’

It is also enacted, by another clause, ‘ That the pain

1800. ‘ of wrongous imprisonment shall be L. 6000 Scots for a
 ‘ nobleman ; L. 4000 for a landed gentleman ; L. 2000
 ‘ for any other gentleman or burgess ; and L. 400 for
 ‘ other persons ; and if any prisoner be detained after
 ‘ elapsing of the respective days, in manner before describ-
 ‘ ed, for obtaining his liberty, the Judges, Magistrates, or
 ‘ others, wrongously detaining him, shall be liable in the
 ‘ pains following, viz. the sum of L. 100 Scots for each day,
 ‘ for a nobleman ; L. 66. 13s. 4d. for a landed gentleman ;
 ‘ L. 33. 6s. 8d. for other gentlemen and burgess ; and L. 6.
 ‘ 13s. 4d. for other persons ; and further, shall lose their
 ‘ offices of public trust, by and attour the pains above
 ‘ specified, and the penalty to belong to the party impri-
 ‘ soned, and process to be competent for the same before
 ‘ the Lords of his Majesty’s Privy Council, or before the
 ‘ Lords of Council and Session, to be discussed by them
 ‘ summarily, without abiding the course of the roll ; and
 ‘ it is declared, that the penalties shall not be modified by
 ‘ any power whatever.’

In defence to this action, Mr Murdoch, the defender, pleaded, 1st, That the pursuer was imprisoned for farther examination, and was consequently not entitled to be released upon bail until the inquiry should be finished ; 2dly, He pleaded upon the statute 39th Geo. III. c. 49. which, after fixing the bail for all persons in inferior situations at L. 60 sterling, proceeds to enact, ‘ That in all cases where
 ‘ any person shall be imprisoned on a charge for being
 ‘ guilty of the crime of sedition, it shall and may be law-
 ‘ ful for the Judges of the Court of Justiciary, or any one
 ‘ of them, on an application for that purpose, in the name
 ‘ of his Majesty’s Advocate, to extend the bail respectively
 ‘ herein directed to be taken beyond the sums above speci-

‘ fied, to such amount as, under all the circumstances of 1800.
 ‘ the case, the Court or other Judge thereof, shall consider
 ‘ sufficient for insuring the attendance, or the appearance
 ‘ of the person accused on the day of trial; *provided always,*
 ‘ that nothing herein contained shall extend, or be construed
 ‘ to extend, to deprive such person of the other benefits of
 ‘ the acts above-mentioned, and particularly of his forcing
 ‘ on the day of trial, as especially directed by the act of the
 ‘ Parliament of Scotland, first above recited.’

This clause, he argued, entitled him to lay the precognition before the Lord Advocate, that an opportunity might be afforded of applying to the Court of Justiciary for an extension of the bail; and he contended, that it was his duty to detain the prisoner in the mean time until his Lordship’s determination should be known.

The cause came before Lord Armadale, as Lord Ordinary; who, upon hearing counsel, decided it in favour of the defender, and found him entitled to expences. This judgment was brought under his Lordship’s review by a representation for the pursuer, but was affirmed by his Lordship.

The pursuer then presented a petition to the Court, complaining of these judgments, to which answers were given in for the defender; where, among other statements, he denied that the petition for bail was presented to him until the 9th July, in place of the 2d as stated by the pursuer. Upon considering the case, the Court refused the petition, and affirmed the sentence of the Lord Ordinary. The pursuer presented another petition, in which he offered to prove, that the petition for bail was presented on the 2d of July, by the evidence of the clerk of Court, and of the under clerks; by the books kept in the Sheriff-clerk’s office; and by the evidence of the persons who prepared the peti-

1800. tion, and their clerks. The defender lodged answers to this petition; and, upon again deliberating on the case, the Court were considerably divided in opinion, in consequence of which, and of the great importance of the question at issue, they appointed counsel to be heard upon the subject in their own presence. Counsel were accordingly heard on both sides, and the following is a brief outline of their leading arguments.

While the importance of a question so deeply affecting the degree of personal protection afforded by the law, was on all hands admitted, it was maintained for the pursuer, that the act 1701 ought to be liberally construed in favour of the prisoner, not only as its declared intention is to secure the liberty of the subject, but as it proceeds upon a jealousy of the judicial power. Its commands, it was said, are express and absolute, that the Judge shall proceed to determine whether the offence be capital or not, and, if not capital, shall fix the extent of the bail in twenty-four hours after the prisoner presents his application; but instead of twenty-four hours, it was maintained that the defender had delayed fixing the bail for ten days, and by his own confession for three days. Such a delay, it was contended, was not warranted by the terms of the act of the 39th of the King, which simply authorised the Lord Advocate to apply to the Court of Justiciary for an extension of the bail—a measure attended with no difficulty, though the accused should in the mean time be at large upon caution; but which contains nothing to justify his detention in prison, during the dependence of unlimited communications and discussions between inferior Magistrates and the Crown Counsel, as to the extent of the bail. Any construction of the act of the 39th which could warrant such proceedings, would, it

was said, operate as a repeal of the act 1701, in the very 1800. face of an express reservation to the accused of all the benefits arising from that statute; by which means the act of the 39th would be made to destroy what it professes to save, and in place of being an intelligible amendment upon the statute 1701, must, in one and the same sentence, be held to confirm and annul it.

That the prisoner was fully committed for trial, and not for further examination, was maintained to be evident from the terms of the warrant or letter to the Magistrates of Ayr, directing him to be detained until liberated in due course of law, which, it was said, is the proper and the only form of a warrant of commitment for trial; since every commitment for further examination, is in practice so described in the warrant, and of this it was said the defender himself must have been fully conscious, inasmuch as in the writing annexed to the precognition, he had given an example of a warrant of commitment for further examination, in which that quality is expressly stated. At all events it was argued, that the act 1701 makes no distinction in the article of bail, between commitments for trial, and commitments for further examination; In which last case, the prisoner, it was maintained, is just as much entitled to liberation upon bail as in the first.

On the other hand, it was contended for the defender, that the petition for bail was not presented to him until the 9th, in place of the 2d of July as was alleged, and that as he gave a deliverance upon it within twenty-four hours, he had complied with the provisions of the statute. The prisoner, it was said, was not entitled to bail, seeing that he was committed for further examination; and this was proved by reference to the terms of the writing

1800. annexed to the precognition, which was maintained to be the original and proper warrant, and which expressly describes the commitment to be of that nature. The other warrant, addressed to the Magistrates of Ayr, directing them to detain the prisoner *until liberated in due course of law*, must, it was said, be construed agreeably to the former warrant; and at any rate, it was argued, that there is nothing in these words to fix the commitment to be for trial, in place of for further examination.

Holding the commitment, therefore, to have been for farther examination, it was contended, that a prisoner in such circumstances is not entitled to be liberated upon bail, since time must be allowed, by the examination of witnesses, or otherwise, for investigating the grounds of suspicion against him. For this purpose, it may be necessary to examine many witnesses; these witnesses may reside at a distance; the inquiry may be extended to very great length, or may lead to other inquiries; and to say that all this must be closed in the space of twenty-four hours, is to speak without due reflection upon the nature of such transactions. It was farther maintained, that from the express terms of the act 1701, it is confined exclusively to warrants of commitment for trial.

Upon this state of the pleadings, the opinions of the Judges were delivered as follows:

LORD JUSTICE CLERK.

I have considered this case with all the attention in my power; and when I say this, I would be understood to mean, that this is not the first time that I have considered it, and that I have not considered it solely with reference to this question. I considered the act of Parliament, on

the meaning of which most of our opinions in this case 1800. must be formed, soon after it was passed; and I have bestowed much reflection upon it occasionally since that period. The opinion, therefore, which I have formed, whether right or wrong, is at least the most deliberate opinion I am capable of forming; as it is the result of my own meditation, enlightened as it has been by the arguments of the bar. I shall not detain your Lordships with any affected professions of attachment to liberty. A person of a liberal education, who has lived so long as I have done under this free constitution, if he is not attached to liberty, must be a fool indeed; and if he accept of an office in any department of the administration of that constitution, without being determined to protect liberty, he must be something worse than a fool. Whether, therefore, my opinion be right or wrong, taking perfect credit to myself for my intentions, I shall proceed to give the reasons on which that opinion is founded.

I am of opinion, that Mr Murdoch must be assoilzied from this action. But, before I enter more particularly into the merits of the case, allow me to make a few observations upon some general topics that have been incidentally connected with it. And, first, with regard to the act 1701, I do think it a most noble and wise act. I think it wise, because it is practical, and because the people of this country, after the experience of a hundred years, have, under it, had as much liberty as human nature seems capable of enjoying. But I cannot be blind to the defects of this act; nor can I consider it of so excessively sacred a nature, as that it is not to be touched, and that we must fastidiously abstain from any given opinion, merely because it may, by some erroneous construction, be held to be an infringement of

1800. that act. Our brethern in the other end of the Island enjoy as much liberty as we do; though, I believe, in some respects, with all their fondness for their own peculiar forms and laws, they have not such wise provisions upon the subject as are contained in the act 1701. But this act is in some particulars extremely imperfect, at least, very incorrectly worded; and I do not know, at this moment, another act in the whole statute-book on which greater doubts or more difficult questions may arise. I think it is a very imperfect enactment in its provisions as to this matter of bail; and the legislature, by attempting to do every thing, have of course fallen into the grossest errors. Our ancestors, at the Revolution, declared, that exorbitant bail was contrary to law; and with this general direction they left it to the discretion of the Judge, subject to heavy responsibility, to exact bail according to the circumstances of each case. The framers of the act 1701 thought they would be more secure; and they proceeded to fix the maximum on a principle most unequal, most unjust, and most absurd. They declared, that it should be so much for a nobleman, so much for a landed gentleman, so much for other gentlemen, and so much for burgesses, &c. without regard to their fortunes, the nature of the punishment to be awarded, or of the crime of which they were accused. If it is possible to suppose any one principle more unjust than another, as to the regulation of bail, it is the rank of the parties. A nobleman is obliged to find bail to the same amount whether poor or rich. Many of them are poorer than landed gentlemen; many landed gentlemen are poorer than burgesses. If it had been necessary to fix the bail in any case, they ought to have fixed the minimum, leaving the Judge to act in other cases according to his discretion; subject to the

general declaration, that excessive bail is contrary to law. 1800. But the idea of fixing a certain sum, as the bail for every rank and condition of life, is perfectly absurd. An act of that kind must necessarily become unequal by the alterations in the value of money ; and this has actually occurred in relation to this act 1701, which has rendered a new act necessary, by which, in the case of sedition, the Court of Justiciary has been vested with a power of increasing the bail. Therefore, I apprehend, that this act, which we are now to consider as explanatory of the act 1701, is founded upon the sounder principle of the two ; a principle, as I conceive, better calculated to maintain liberty, which is nothing but the protection of the few and the weak, against the many and the strong. I have, therefore, no favour for the act 1701 in so far as regards the provisions as to bail. But if I see another act, founded upon sounder and more equitable principles, I shall not hesitate to give to it as fair and liberal an interpretation as I would do to the former. Independent, however, of bail, nothing can be more unjust than the degree of reparation for wrongous imprisonment given by the act 1701 ; which is entirely accommodated to the rank of the parties, without any regard to the circumstances of the case, making no distinctions betwixt different degrees of the offence ; not considering, in any shape, whether the offence has been wanton or even criminal ; whether it has been done ignorantly, and without bad intentions, or, for the purposes of revenge and oppression ; or whether, in short, the party has committed a mere mistake, in point of law, or has been actuated by the basest passions. If there is any justice, any propriety, or any principle, except a principle of injustice, in punishing a man who acts *bona fide*, upon the best interpretation he can give

1800. to a doubtful act of Parliament, I know not what justice or injustice is. One man may be imprisoned without much inconvenience to himself; another man may be ruined by the same means. It may be of little importance to one person, in a pecuniary point of view, where he spends his time; but the presence of another man in one place may be essentially necessary to preserve himself and his family from absolute want; and yet the act 1701 gives just the same reparation in all these various cases, however opposite the circumstances, and however different the consequences may be. No distinction is made, whether the man has been illegally imprisoned or wilfully oppressed, but all are included in a general and arbitrary reparation entirely unconnected with the fact, and regulated, in no degree, by any of those special circumstances which ought to enter into every case of the kind, and may render one action criminal, and another comparatively innocent. We see, that the defects of the act 1701 are, in reality, felt by the country; because actions for wrongous imprisonment are never laid entirely on the act 1701, but on that in connection with the common law. By this means, a sufficient remedy is provided in cases of wrongous imprisonment; but the act 1701, by itself, does not afford a fair remedy, but a sort of reparation, which is most unequal, and most unjust. These explanations I have thought it necessary to premise, least some of your Lordships should think I am disposed to touch the act 1701 rather with too heavy a hand. But I do so only in so far as I think the act defective. Its best commendation is, that with all its defects and imperfections, practically speaking, it has answered the purpose which our ancestors had in view.

The other general topic to which it is necessary for me here to allude, is one which was much founded on by

the counsel for the pursuer, That in the enactment of this 1800. law, the legislature proceeded on the supposition, that the constitution of this country is founded on a jealousy of the judicial power. There is no such jealousy in this country, or in any other country that ever called itself free; the very idea is absurd. The legislature cannot be jealous of the judicial power; the constitution cannot be so jealous. If they are so jealous, they will remove the judicial power. They may no doubt hold, that from the frailty of human nature, an individual magistrate may abuse his office; but are they, on that account, jealous of the judicial power at large? On the contrary, they hold, that if the oppression and abuse have been committed, redress must be had for the subject, from the very necessity of the case, in one way or another from this very judicial power. Jealousy of the judicial power, my Lords!—what becomes of all your laws? How are they to be executed? By what means are the people to be protected, or the law enforced, if there is any jealousy of the judicial power? Is it the act 1701 which gives a man redress when illegally imprisoned? No; it is this very judicial power of which the country and the constitution are said to be so jealous. I say, therefore, that if there is any thing following from the opinion which I am now to deliver that may be supposed to introduce in some cases a degree of injustice or oppression, the individual will just have the same redress in that respect, that he would have in any case whatever at common law. And who is to give him this redress? When a man is imprisoned, as accused of a crime necessarily bailable, is it not the judicial power that must give him redress?—he must be released by a suspension and liberation. He owes his freedom to the judicial power; and, so far from any thing like jealousy, I believe

1800. the country entertains a very different feeling indeed, as to the judicial power. I am, therefore, not in the smallest degree actuated by this idea, that there exists any jealousy of the judicial power; the constitution does not know it, and cannot feel it. On the contrary, it does rely with confidence upon the wisdom and integrity of the judicial power; it relies upon the wisdom and integrity of the judicial power for redress to the subject. I fear it would be bad for this country indeed, and our liberties would rest upon a very slippery foundation, if the country were to suppose, that the mere letter of the law could protect them, independent of the integrity of courts of justice. Many countries have had good and wise laws, and yet their situation has been as miserable as ever it was without them. There is one country, which, in spite of the experience of 14 years, still calls itself free; and, for any thing I know to the contrary, may have had as good laws as we have. That country has undoubtedly been jealous of the judicial power; and yet I think, it is not much farther advanced in political happiness, than when its first attempts at liberty began. But it is not bad laws of any kind that have retarded its progress; it is bad judges; bad magistrates; subjects who are abject slaves; and, therefore, incapable of executing the laws with impartiality and vigour. Happily that is not the state of the country in which we live. From our prejudices, from our manners, from our habitual education in liberty, we are anxious to preserve a strict obedience to the laws; and, knowing that our Judges have the same feelings as ourselves, we look to them with confidence, and not with jealousy.

Having said so much upon the general topic connected with this cause, I shall now proceed to state the opinion I

have formed upon the merits of the special case before us. 1806.

The facts are extremely short and simple. There has been some doubt whether there was a verbal application for bail; but I do not inquire whether that was the fact or not, as every such application must be in writing. The facts are these. Upon the 28th June, this gentleman was apprehended, upon suspicion of seditious practices. A precognition was taken, in the mean time, and a warrant of commitment was granted by the Sheriff-substitute, addressed to the Magistrates of Ayr, which is in very particular terms. It is on page 7th of the petition. [*Reads the warrant.*] This is the warrant on which he was committed; and this was transmitted to the Magistrates, and to the jailor; and it is the warrant on which we are to deliberate. The warrant on the precognition was not sent. Being committed on this warrant on the 2d of July, a written petition for bail is presented; on which the Sheriff gave this deliverance. [*Deliverance.*] The petition was returned to him on the 12th, on which day he finds the crime bailable, and admits the prisoner to bail. Upon these facts the present action is brought.

In considering this warrant, I am of opinion, that it was intended, and is, in its nature, and was understood by the Sheriff, by the prisoner, by his agent; by the magistrates, by the jailor, by every person concerned, as a warrant of commitment for further examination. As a regular warrant for commitment for trial, it is more illegal in a variety of other particulars, than in those on which this gentleman has chosen to found his objection; for, in the first place, it is in the form of a letter—a thing contrary to all practice; and, in the second place, the magistrate is not designed; and it is impossible to divine, from the words of it, who or

1806. what he is. The Magistrates of Ayr were not bound to pay any respect to it, as it did not bear to be signed by a magistrate. For any thing they knew, this Mr Murdoch might have been a brother shoemaker of the prisoner's. The warrant is also much too general in the specification of the crime. The term seditious practices, has no strict nor definite meaning; neither is it a term known in the law of the land. If taken as a warrant of commitment, in order to trial, therefore, I say, that it is infinitely more illegal than in the particulars which are the foundation of this action. It is illegal in requiring close confinement of the prisoner; for the act 1701 discharges all close confinements beyond eight days. But even that cannot be after the commitment for trial; the prisoner must then have the means of preparing his defence—his counsel and agent must have full access to him, and he must have the use of pen, ink, and paper, under inspection of the magistrate: so that this warrant is ten times more illegal, if it is to be considered as a warrant of commitment for trial, and would have founded the pursuer in an action of damages upon a much stronger bottom than the present. The act 1701 allows close confinement for eight days, upon the supposition that the prisoner is committed for farther examination; because, it may be essential for the ends of justice, that, during this time, no communication should be held with him; and a man, when he brings himself into that situation, must submit to those things that are necessary for the discovery of his guilt. I am sure it is unnecessary for me to prove, that if such a person is indulged with free access and communication, in nine cases out of ten the means of evidence would be destroyed. In this view, therefore, I say, the warrant cannot rationally be considered as a warrant of

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commitment, in order to trial. But, if the Sheriff understood the warrant as a warrant of commitment for further examination, it appears, by the pursuer's own confession, that it was also so understood by the prisoner; for he has not complained, that in those particulars in which the warrant was grossly illegal, that it was a warrant of commitment for trial; and he did expressly, by his counsel, state, that no copy of this warrant was given to him, nor demanded by him, at the time of his commitment. Now, this never would have been omitted, if he had conceived it to be a commitment for trial. For, there is not one person in the least acquainted with the law, even in the lowest department of the profession, who does not know, that the first step in all such cases, is to demand a copy of the warrant on which the prisoner stands committed. No man can refuse a copy of this warrant. The prisoner is entitled to have it. But it was never demanded in this case; which is a complete proof that the warrant was considered, by all parties concerned, as a warrant of commitment for further examination. The Sheriff so understood it—the Magistrates so understood it—the jailor so understood it—the prisoner so understood it; and, therefore, be it a warrant or not, according to its own terms, for further examination, it was so considered and believed by every party concerned. That being the case, and it being also the law, that a warrant of commitment for further examination is not bailable, I am of opinion, that that ends this question.

It was argued at the bar, that a warrant for further examination is just as bailable as a commitment for a crime. If this be the case, the act 1701 is very incorrectly expressed, in so far as relates to the warrants to which it is meant to apply. It is most anxiously stated, however, that it ap-

1806. plies only to warrants of commitment for custody, in order to trial; and, I cannot conceive that the legislature would use this specific language, if the act was meant to apply to all warrants whatever. But, according to the argument alluded to, it does apply to all warrants whatever. This is a doctrine which I should have thought was long ago settled; and if there were a doubt about it, I do not think myself now at liberty to stir that doubt, even although I had entertained it. We are not, upon speculations of our own, to give a new interpretation to the act 1701. We are to take the interpretation which was put upon it by those who made it; and we are not to pretend to be able to protect liberty better than our ancestors. I do not conceive myself at liberty to depart from the law, that a warrant of commitment for further examination is notailable. That this is the law cannot possibly admit of dispute. I ask any one of your Lordships, who have acted as Sheriffs, whether you ever entertained a doubt upon the subject. This may no doubt lead, in particular cases, to oppression—most undoubtedly it may; and this gross oppression may be committed in face of the act 1701. It is true, the Magistrate may abuse the liberty of committing for further examination; but still the remedy is plain and easy. If the Sheriff delays to bring the man to his further examination, he can apply to this Court by bill of suspension and liberation; or the time which he continues in prison may be reckoned a part of the *induciae* of his criminal letters. It is true, it may be stated, that the Court of Justiciary may refuse to bail, and the act may no doubt be violated there in its provisions, as well as its spirit; but, if we do refuse, we are answerable to a higher power. It has been said, that the words ‘until liberated in due course of law,’ render this warrant a warrant of commitment for trial, in contradiction

to a warrant for further examination. These words, however, do by no means imply that this was a warrant of commitment for trial. Every warrant issued by the Court of Justiciary bears, that the party is to be apprehended, and committed until liberated in due course of law; and persons apprehended under such warrants, are every day brought before the Sheriffs, and other inferior Judges; but, until the examination be over, although the crime be bailable, and the Judge delays to bail, yet it never enters into any one's imagination to suppose, that there is here any transgression of the law. It may be necessary to re-examine the prisoner, in consequence of new information received from other quarters; and in this way he may be brought up ten times in a week, and as often recommitted for further examination. That is my opinion, without going farther. But even going farther, and holding this to have been a warrant of commitment for trial, then it is my clear opinion, that what the Sheriff did was warranted—nay, required, by the act of the 39th of the King. This act, after raising the bail, in all cases, declares, ‘That in cases of sedition,’ &c. &c. As I have said before, this act appears to me to be founded upon sounder principles, and principles more consonant to the laws of the other country, and to the principles of reason and justice, than the act 1701; because it makes the bail applicable to the circumstances of the party. Bail of 6000 merks for a nobleman! In the first place, it may be great injustice to some noblemen; but with regard to others, this notion of taking such bail for the commission of a crime, is an absolute farce and impunity; while, on the other hand, to a man of no fortune, it is the extreme of oppression; because, he may not be able to find the bail, small as it is. As this act, therefore,


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1806. appears to me to be founded on a sounder principle than the act 1701, I perceive no obstruction to my giving it a fair interpretation; that is, an interpretation in connection with the act 1701. This act allows the Court of Justiciary, upon application made to them, by his Majesty's Advocate, in all cases of commitment for sedition, to extend the bail; but if this act was not to receive a fair and liberal interpretation, it cannot be applied to the greatest number of those to whom it was meant to apply. To follow the fair meaning of the act, therefore, we must give effect to it, according to the fair meaning of those who framed it. If it is the meaning of the act of Parliament, however, that in every case of commitment for sedition, in however remote a part of the kingdom it happens, in which it allows an application to be made to the Court of Justiciary for an extension of bail—that this application shall be made, and determined upon, with all the correspondence attending it, and the result communicated to the prisoner, within twenty-four hours; then, to be sure, applications may be made to the Court of Justiciary, and the Court of Justiciary may decide upon them; but the prisoner must be set at liberty, and may escape far beyond the reach of every Court in the kingdom, long before the issue of such application can be known in the quarter where the crime is committed. If this be really the meaning of the act, the necessary forms may no doubt take place; but the substantial meaning and effect of those forms must, as was emphatically expressed by the counsel for the defender, be confined within the visible horizon of Edinburgh. Is it possible, then, to hold, that the legislature gravely designed to put so many of its subjects out of the protection of the law—to enact a *privilegium* for a large proportion of those subjects, upon no ground

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but the blind and arbitrary law of physical situation ; or to make that sedition in one part of the kingdom which is not sedition in another ? Can your Lordships possibly believe, that in one part of the country a man is to be punished for what, in a different part of the country, he may commit with perfect impunity ? I never will infer, nor is it possible for me to presume, that the legislature meant such a gross piece of injustice and absurdity. Sitting here, as a judge of the law, I do not hesitate to say, that if any thing could warrant rebellion, this would warrant rebellion, to those who are in this way cast out from the protection of the law. It is impossible for me to say, that the legislature intended this mockery, and that therefore I cannot repair it—that they have done an act of the grossest folly, but it is beyond my power to apply the remedy : On the contrary, the remedy lies in the fair construction of the act ; and I must put that interpretation on it which is consistent with common sense. The counsel for Andrew were aware of this, and they argued, that this application to the Lord Advocate was intended to be made before the prisoner was apprehended at all ; but although it had been intended so to be made, my opinion is, that the Sheriff was right in so doing, and that the act of Parliament necessarily infers this power in the Sheriff. Suppose a man near Edinburgh is apprehended for sedition ; his crime is instantly frustrated, and his person secured. But go a little farther from Edinburgh, and there, although the Magistrates see sedition staring them in the face, they must stop short—they must liberate the prisoner, or they must write to his Majesty's Advocate. But this, it will be said, is just putting the subject in the power of the inferior magistracy ; but, for my part, I see no impropriety in the Magistrate's stating the

1806. case to the Lord Advocate, and in the Lord Advocate stating it to the Court of Justiciary. It is exactly what the acts point out; and if the case were so stated to the Court of Justiciary, I ask any of your Lordships, who are members of that Court, not only how you would proceed, but how it is possible for you to proceed in any way but one, in such circumstances. I have no hesitation in saying, that I would proceed on no other ground but the precognition. It is pretended, indeed, that it would not be legal for us to see the precognition. That would be jealousy of the judicial power, with a vengeance; and the Judges of this Court of Justiciary would, in that case, be the only Judges who are prohibited from seeing the precognition. There is neither justice nor reason in the rule which would allow inferior Judges to see the precognition, and yet would prevent us from seeing it; but, in point of fact, Judges of the Supreme Court do look at precognitions every day, and must look at them in cases where bail is required. A man may be committed for treason or murder, which are not bailable in law; but it is in the discretion of the Court to bail them according to the circumstances of the case; and how are we to know those circumstances, but by looking into the precognition. Suppose that this, which is said to be murder, was done in self-defence, or that it was accidental, such as a mason letting fall a stone from the top of a house; in this case, the public prosecutor perhaps might not think of bringing a party to trial; but the relations of the deceased, who very often, and very naturally, feel resentment in such cases, may apply for a warrant of commitment on the result of a precognition. In this case, the precognition is the only way in which we can possibly discover whether the crime, in sound discretion, be bailable or not. Many

other cases might be mentioned of the same kind. I re- 1806.
collect of a man who was apprehended for forgery, which, 
in general, is not bailable, who presented an application to
me for bail; and, as he produced, at the same time, a cer-
tificate under the hand of the party, whose name he was
accused of forging, that the subscription was a true one, I
had no difficulty in bailing him, on examining into the case.
It is, therefore, not illegal for the Judges to see the precog-
nition; it is the only legal and constitutional mode by
which they are to arrive at the circumstances of the case,
in order to discover whether the crime be bailable or not.
If it is to be held as unlawful for Judges to look at the pre-
cognition, this seems to me to be giving a greater wound
to the act 1701, than any with which it has been threat-
ened here; for, if the precognition is to be laid aside, we
have nothing to proceed upon but the information of some
petty magistrate.

In the present case, I see the Lord Advocate did not think
it necessary to apply for an extension of the bail. I sup-
pose this Mason-lodge was magnified into the most dread-
ful society that ever existed; and I dare say, if the inferior
Judge's information was produced, we should see very
heavy and very ridiculous charges brought against it. But
this does not in the least affect the view of the case arising
from a fair construction of the acts of Parliament, unless
we are to hold, that there is to be a *privilegium* for people
living within a circle of a few miles round Edinburgh. It
is said, that the person of the prisoner is at the discretion
of the inferior Judge, until the Lord Advocate consider the
case; my answer to that is, that when any abuse happens,
a remedy is provided. What happens when a man is im-
prisoned without a cause at all, and bail is refused? What

1806. remedy is there, but a bill of suspension and liberation? He has no other remedy whatever; but, in that case, he has just the same remedy that he has in all other cases of oppression. It is true, that a man tried in Orkney may be kept longer in jail, than a man within this magic circle round Edinburgh. So he may; and that is one of the contingencies attending his local situation; and the remedy must be higher damages. The residence at a distance from Edinburgh is one of those circumstances which must happen in the nature of things, and cannot be remedied or avoided. Many disadvantages attend a residence at a distance from the Supreme Courts of Justice, but these it would be vain to attempt to obviate; and unless we can make the Supreme Courts of Justice omnipresent, like the Supreme Court of Justice above, it is impossible to provide a remedy for such cases. In point of fact, however, these cases are not altogether without remedy; for the sixty days will run immediately from the commitment. But, even in Orkney, ten or twelve days may elapse before the application can be presented to us. That is a necessary evil, arising from the place of residence. It is no hardship for a man to be imprisoned in Edinburgh; he will get out in an hour's time; but for a man, residing at Perth, Stirling, or in Orkney, the case is different. It may be rendered different even by the accidents of stormy weather. All these are contingencies resulting from the situation of the party to which he must submit; and even though the time should be unnecessarily prolonged by the Sheriff, the Lord Advocate, or the Court of Justiciary, he has his remedy in the act 1701 and at common law; this remedy will be in every case proportioned to the time he is detained in prison; and whatever other circumstances he has to complain of will naturally affect the quantum of his

damages. These considerations naturally lead me to the conclusion, that the common law of the land, joined to these two acts of Parliament, imposes an adequate responsibility upon all Magistrates; and acting, as they do, subject to that responsibility, I do say, that the liberties of the country are most sufficiently protected. I am, therefore, decidedly for assoilzieing; and even if my opinion had been as decidedly the reverse, yet if I had seen, or shall see, a great difference of opinion among your Lordships as to the construction of a doubtful act of Parliament, I should not have found this gentleman guilty. I know the act 1701 declares, that the penalties shall not be modified by any power whatsoever; and let the penalties be once justly incurred, and I am sure they shall not be modified by me. But shall I find this gentleman guilty, when he was acting *bona fide* in the interpretation of the statute, as to which a difference of opinion prevails even among your Lordships? If this had been a violation of any of the established principles of the act 1701, or the act 39th of the King, I would not have believed that the Magistrate could have acted *bona fide*, and I would not have allowed any Magistrate to tell me of his *bona fides*. But I cannot convict any person in opposition to my own judgment. The act 1701 is extremely doubtful in many particulars, even with the aid of the 39th of the King. It is still a question, what is the real time that must elapse from the time of the prisoner's commitment to the time of his trial, whether it be a hundred or a hundred and forty days? But because the inferior Judge, upon the first occurrence of a doubtful question, has hesitated upon the point, shall I begin with inflicting the penalties on him for doubting, in the same manner as if he had been guilty of wilful and notorious oppression? I certainly shall

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1806. not ; and, therefore, I am clear for assoilzieing Mr Murdoch from this action.

LORD NEWTON.

This is a very important case ; and, if it is decided one way, it appears to me that there will be an end of the act 1701. I shall pass over very much of the able argument stated by my brother who spoke last, as it does not appear to me to have much application to the present case. The *species facti* before your Lordships is very short and simple. A warrant was issued against Andrew, and another person, on the 28th June, for seditious practices. No great apprehension was entertained of their making their escape, for they were not examined until the 30th. A precognition was immediately taken ; they were afterwards judicially examined ; and then the defender grants a warrant in these terms. [*Warrant.*—This is the warrant which was acted upon, and on which the prisoners were committed. They were not accused of treason, or of being concerned in any insurrection. In that case there would have been no occasion to determine the bail, because the offence is notailable. They were accused of seditious practices, which isailable. There is some doubt as to the time when application for bail was first made. It is said, that a verbal application was made. I do not know whether this is admitted ; and there is also some doubt about the time that the written petition was first presented for bail. In my opinion, it was the duty of the clerk to have marked the day on which that petition was given in ; and, if he has neglected his duty, I am not sure but that the fact may be proved by parole evidence. At any rate, there is no doubt that a petition was presented on the 2d, upon which no deliverance

was made. A correspondence took place betwixt the Lord Advocate and the Sheriff; during all which time, the pursuer remained in prison. At last, upon receipt of the Lord Advocate's answer, a deliverance is written out upon the petition, and, upon the 12th, the prisoner is admitted to bail. Upon this short and simple statement of fact, it is perfectly impossible to deny, that there was a breach of the act 1701. A great deal has been said about the impropriety of the act in defining the quantum of bail in every case; and it is said, that the legislature ought to have left that to the discretion of the Judge, subject to the general direction, that excessive bail ought not to be required: But, I own, I am against committing indefinite powers to the discretion of any man; and I do think the legislature did very wisely in defining the quantum of the bail. It is said, that many persons in that class from which the highest bail is taken, are, in point of fact, not so rich as many in the other classes, for which the statute fixes a much lower sum; and that the sum, in many cases, must be so disproportionate to the circumstances of the parties, that they can easily defeat the ends of justice, by forfeiting their bail-bond. But, it is to be observed, that it is not the riches of the parties which the act of Parliament takes as the rule for determining the bail, but their rank and condition in society. It would be altogether impossible, and, indeed, quite absurd to commence an inquiry, in each case, into the circumstances of the party. Many men could not tell what they are worth, and such a practice would give rise to the greatest oppression and confusion. As to rich men forfeiting their bail-bond, there is no great danger of this becoming general; the consequence of forfeiting their bail-bond is not merely the payment of the sum; it is followed

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1806. by confiscation—it is followed by outlawry—which are greater punishments than can be inflicted, in many cases, in the course of the trial. The legislature has calculated these checks as sufficient to prevent any practice of that kind; and it appears to me, that they have done wisely in defining the quantum of the bail, and thus depriving the Judges of the least pretence for the exercise of discretionary power. In regard to the defences maintained by the defender, the first is, that the prisoner was committed for further examination, and that he was not, therefore, entitled to bail, as the act 1701 does not apply to warrants of that kind. Now, in the first place, I cannot admit, in point of fact, that the prisoner was committed for further examination; and I have no occasion to say more on this point, than that the warrant does not bear that he was so committed; and as to the other warrant which is founded on it, it is not ascertained when it was made. For any thing I know, he may have made it out at a subsequent period, to found the plea which he now maintains. But, secondly, I am perfectly clear, that although he were to be held as having been committed for further examination, that would make no difference upon the case, as the act 1701 unquestionably applies to warrants of that kind, as well as to warrants of commitment for trial. This opinion, which I entertain of the act 1701, I have entertained for 40 years; and, it appears to me to arise very clearly from a sound construction of the act. For, first, it is extraordinary, to say nothing more, that a man, against whom the accusation is so far proved, should be in a better situation than a man against whom there are only floating suspicions. But, secondly, suppose it to be made out ever so clearly, that the suspicions are well founded, what is the

consequence?—then you close the inquiry, and imprison him for trial. In that case, there is not a doubt that he can go to the Judge and say—‘*Cognosce* the bail—liberate me upon bail, otherways you must be answerable in the penalties of the act 1701.’ But it is perfectly obvious, that if this doctrine were to be listened to, about commitments for further examination, no man against whom the Judge had a pique would ever be committed for trial. He would always be committed for further examination; and the Judge would have it in his power to defer the diet of his examination, and thereby prolong his imprisonment for an indefinite period. My brother stated, that the act 1701 did not extend to warrants of commitment for further examination. But what does he say to this clause—‘And his Majesty, with advice and consent foresaid, extends this act, for preventing wrongous imprisonment, to the case of all confinements, not either consented to by the party, or inflicted after trial by sentence.’ Is there any doubt that, upon the construction of this clause of the act, it applies to this warrant? Does it appear that the prisoner consented to the confinement; or can it be said that it was inflicted after trial by sentence? It appears to me impossible to doubt, that the warrant is comprehended under the terms of the act. That is my firm opinion. It is possible I may be wrong; but I cannot put a different construction upon the words of this clause. The second defence of the defender is founded upon the act of the 39th of the King. This act was intended to enable his Majesty’s Advocate, in cases where the offence was flagrant, to apply for an extension of the bail. It declares—‘That in all cases,’ &c. But the question here is, not as to the Lord Advocate applying to the Court of Justiciary, but as to the inferior

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1806. Judge applying to the Lord Advocate; that is a proceeding which, in my opinion, is not sanctioned by any thing in the act. My brother stated, that, in determining upon such application, the Judge was entitled to be guided by the precognition. I am sure I differ with very great deference, but, I confess, it does appear to me a very indecorous thing, indeed, for a Judge to consider a precognition, or to found any proceeding upon it. I hold it to be the privilege of the subject, that no evidence shall be received or admitted against him, but what is taken down and examined in his own presence. But this is not the case in a precognition. He has no opportunity of knowing or objecting to the witnesses that are adduced against him. The lowest rabble may be examined, and great injustice is done to the prisoner if any part of the proceedings is founded upon such evidence. In short, we see plainly what was done in this case. The prisoner was apprehended, and committed—he applies for bail; but, instead of admitting him to bail, the Sheriff applies to the Lord Advocate: The Lord Advocate, however, is satisfied with the bail offered, and instructs the Sheriff to take it accordingly; but, during these proceedings, this poor man is condemned to lie in prison for twelve days, instead of twenty-four hours, which are allowed by the act. I really think it is impossible not to hold that there is a breach of the act; and I cannot discharge my duty if I do not give my opinion accordingly.

LORD ARMADALE.

There is still one point of fact, which requires to be ascertained. I mean, an allegation, which, if I had seen it stated in the relevant and pointed terms that I see it averred in the second reclaiming petition, I should have thought

worthy of the strictest and fullest investigation. The 1806.
fact I allude to is, Whether the petition for bail was pre-
sented on the 2d or 9th of July? It is a matter deserving
of inquiry, and, I think, a legal mode of proof is offered,
namely, the books of the Sheriff Court. From all that I
have yet heard, I conceive that I am bound to hold, that
after this man was apprehended, after he was examined,
and a warrant granted for his commitment, in clear and
specific terms, he was committed in order to trial. It spe-
cifies a charge, in consequence of which he is detained
until he should be liberated in due course of law. That
appears to me to be the form of a warrant of commitment for
trial. The defence that is stated to this action is, first, that
this was a warrant of commitment for further examination ;
and, secondly, *esto*, that it is a warrant of commitment for trial,
there is no irregularity, as, in consequence of the act 39th
of the King, it was necessary to have a correspondence with
the Lord Advocate, in case he should chuse to apply for an
extension of the bail. In examining the first of these
defences, it must be admitted, that by the law and
practice of this country, at all times, even before the
act 1701, there was a clear, manifest, just, and necessary
distinction betwixt warrants of commitment for further ex-
amination, and warrants of commitment for trial. Plain
common sense, independent of law, tells us, that the con-
sistency and purity of judicial proceedings, would be entirely
at an end, if there were not a solid distinction betwixt the
proceeding of an examination, and of a commitment for
trial. I think that the one ought regularly to precede the
other, unless where the facts are so clear as to render any
examination unnecessary. I am clear, that upon a sound
construction of the act 1701, it never was meant to apply,

1806. and, in fact, does not apply, to warrants of commitment for farther examination. The statute makes no mention of such warrants, and gives no power whatever in that case. It embraces a great variety of objects; but it does not specify any rules or regulations, in regard to what is to be done when the prisoner is first apprehended. A variety of circumstances may occur in this case, so as to render it absolutely necessary to detain the prisoner for some time, and highly dangerous to admit him to bail. He may be apprehended at the distance of 100 or 200 miles from any jail. It may be impossible, for some time, to find any Judge who can examine him. He must therefore remain in confinement; but would it ever be held that in the mean time he was intitled to bail; or, that he behoved to be liberated before he had reached the Judge, or had been examined. It has been said, that the act 1701 is expressly extended to the case of all warrants, not either consented to by the party, or inflicted after trial by sentence; and that warrants of commitment for further examination must be included under this general clause. But, with great deference, I cannot think that this is a sound construction of the act. I find that the act applies, in the enacting words, only to imprisonment for crimes or offences; and, in order to prevent any mistake, there is afterwards a general clause of exception, whereby it is declared, that the liberation provided by the act is only to be understood from imprisonments ‘for the causes foresaid, and without prejudice of all personal diligence or imprisonments for payments of debt, or upon sentence, or for any other causes than those above expressed, in the same way and manner as was competent before the making hereof.’ Now, if there is any evidence, that, before the act 1701, commitments for farther exami-

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nation were legal, would you not rather hold, that they fall under the exception here mentioned, than that they were comprehended under the former clause, although the act expressly declares, that it applies only to imprisonments for the causes foresaid,—that is, for crimes and offences; and it afterwards reserves all commitments for any other causes to be regulated in the same way as they have been by the former law. It is impossible to doubt, that, previous to the act 1701, warrants of commitment for further examination were perfectly legal; and the statute having first laid down regulations as to imprisonment for trial, afterwards makes an exception, and declares, that all other cases shall be excepted. Now the case of commitment for farther examination, was a case which did exist at the time; and it seems to be, therefore, clear, that it must be excepted, as well from a sound construction of the act, as from the reason and necessity of the thing. Is it possible to say, that before a man has been finally committed, he is to be liberated on bail? There is certainly no provision in the statute, which imports either directly, or by any reasonable implication, that while a man is actually under examination, he may insist upon being liberated upon an offer of bail. Can your Lordships hold, that in the middle of his examination, he is entitled to require a Magistrate to stop his proceedings, modify the bail, and set him at liberty? It may not yet appear what crime he has been guilty of, and until that is determined, and something like a reasonable knowledge of the fact obtained, I am clear, that the prisoner must remain in custody. Holding, therefore, in point of law, that the statute 1701 does not apply to warrants of commitment for farther examination, it remains to be considered, Whether, in point of fact, the

1806. warrant in this case was, or was not, a warrant of that description? When this cause depended before me, in the Outerhouse, I thought myself entitled to take into my consideration certain collateral circumstances, arising from the Judge himself having granted a different warrant under his hand at the same time. Accordingly, there is a warrant on the back of the precognition, which then appeared to me to be the warrant of commitment; and, if I remained of the same opinion, I should still hold that as a warrant of commitment for farther examination; but I am now satisfied, that it cannot be held as the warrant of commitment; and, therefore, I lay it entirely out of my consideration. It is not the warrant on which the prisoner was committed—the other warrant was sent to the Magistrates of Ayr—it was delivered into the custody of the Jailor, as his authority for detaining the prisoner—and it is the only warrant of which the prisoner could have obtained a copy. It is true, something has been founded upon the circumstances under which the warrant was granted, and the defender has pleaded in some measure upon his intentions; but I am not entitled to enter into such circumstances—no Judge is entitled to go into extraneous matter. The warrant of commitment is the act of the Judge; the prisoner is entitled to a copy of it, if he demands it. Having got the grounds of his detention, he is entitled to apply for bail, and the Judge is bound to admit him to bail; and, therefore, I must disregard all those other circumstances. Is there one word in the terms of this warrant that imports, that it was a warrant of commitment for farther examination? Is there not evidence, that the prisoner had been already examined? In short, I cannot read this warrant without being satisfied that the commitment was for trial. I see first a specified

charge of seditious practices; and, secondly, an order to receive the prisoner into jail, therein to remain, until he should be liberated in due course of law; which words, as far as I have been able to discover, either from the practice of the country, or the authority of writers, do not import that any farther examination is to take place. The Sheriff, however, delays, in respect that it was a warrant for farther examination. But, supposing that to be the case, what should have followed? The prisoner certainly fell to be discharged, but instead of that, what does the Sheriff do? Upon the 12th he admits him to bail. The Sheriff thus views his own warrant as a warrant of commitment for trial, for he proceeds to cognosce the bail. If there was no other warrant of commitment, the prisoner fell necessarily to be discharged, for he stood committed for farther examination; but the Sheriff cognosces the bail, and no farther examination took place. At one time, the Sheriff says, that the prisoner was committed for farther examination, but he conducts himself at another time as if it had been a warrant for trial. He changes his doctrine according as it suits him, but ultimately he takes bail, and upon that bail the prisoner was tried. I, therefore, hold it to have been a warrant for custody, in order to trial. With regard to the second defence, founded on the act of the 39th of the King, if that act had said, that in all cases of commitment, the Court of Justiciary should be entitled to judge of, and determine the bail, I should have thought that this defence had considerable force, but no such thing is either stated, or can be collected by fair construction from the act. It increases the rate of bail in all cases, and then there is a clause to this purpose, 'In all cases of sedition,' &c. &c. I am very far from saying that this is well

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1806. expressed, or that it can be extended conveniently to all cases. And what has been stated is certainly true, that persons living in a remote corner of the country may be in a better situation than persons in the vicinity of the capital. But the statute 39th of the King has not said, that in all cases the bail shall be determined by the Court of Justiciary; neither is an application by the Lord Advocate the usual mode of applying for bail. The meaning of the act is, that if too little bail has been received, the Lord Advocate is entitled to have greater bail taken, or else, that the party shall return to prison. If the person is residing near Edinburgh, he must submit to remain in custody until the bail is extended by the Court of Justiciary. In the same way, when a person is apprehended at a distance, the Sheriff should take bail in the mean time, leaving it to the Lord Advocate to apply for an increase of it, in case he shall think that necessary. As to the powers of inferior Judges, in making application to the Crown Counsel, I see no ground whatever for it in the act 1701. Upon the whole matter, it appears to me that the case is very clear that this was a warrant for trial, and that the Sheriff did not proceed according to the clear and simple directions of the act, to cognosce the bail, and liberate the prisoner within the twenty-four hours.

LORD CRAIG.

I am not ashamed to say, that I have changed my opinion in this case. I formerly thought that there were grounds for assoilzieing the defender. I afterwards altered that opinion, but, upon farther consideration, I have returned to my first opinion, and I shall now deliver the grounds upon which it is founded, as to the different

points in dispute. There appear to me to be three points 1806.
 for your Lordships consideration: First, what is the effect
 of a warrant of commitment for farther examination, and
 of the act 1701, as applicable to such a warrant? Secondly,
 whether, in point of fact, this was a warrant of that des-
 cription, or for trial? and, lastly, what is the effect of the
 act of the 39th of the King upon the act 1701? As to the
 first, I never had a doubt that the act 1701 does not apply
 to warrants of commitment for farther examination; and,
 from the very nature of the thing, I shudder at the conse-
 quences that would follow, if your Lordships were to find
 differently. The consequence would be, that whenever a
 person chose to disappoint the bail, and defeat the ends of
 justice, he might do it with impunity; and, I am sure,
 that if it is now to be established, that the act 1701 applies
 to warrants of commitment for farther examination, there
 is not a Judge, who has ever acted as a Sheriff, that may
 not be found liable in the penalties of wrongous imprison-
 ment: in short, it would put an end to all sort of investi-
 gation by inferior Judges. It has been said, that if the doc-
 trine were to be admitted, that commitments for farther exa-
 mination do not fall under the act 1701, no Judge would
 ever grant a warrant for trial against a person that he dis-
 liked, but would always keep him incarcerated for farther
 examination. But, I answer to this, that although the act
 1701 does not apply to imprisonments of this kind, there is
 yet a remedy by an action of oppression and damages, at
 common law. But where a warrant has been granted, not
 for farther examination, but for trial, I think the act 1701
 does apply; and there being such a distinction betwixt the
 two cases, the consequence of this is, that it lays the Magi-
 strate under the obligation to be more particularly careful

1806. and attentive as to the terms of his warrant. The result of all the consideration that I have been able to give to this case, is, that I think this was not a warrant of commitment for farther examination, but a warrant of commitment for trial, and that it therefore falls under the act 1701. The words are, that they are to remain in prison until liberated in due course of law; and this, I think, is the peculiar form of a warrant of commitment for trial. It is, no doubt, true, that there was another warrant differing in some respects from the one in question; and I do believe that there was some confusion in the Sheriff's mind at the time; but, taking the whole together, I cannot entertain a doubt, that the commitment in this case was a commitment for trial. At one time I thought that the warrant annexed to the precognition might have been used as a mode of explaining the Sheriff's proceeding, and of arriving at the true ground of the commitment; but I now doubt if this can be done—I have no doubt that it was done *unico contextu*, and I cannot approve of any thing that is said against the Sheriff's intentions, knowing him, as I do, to be a very respectable man; but I doubt how far I can explain the one warrant by the other. The only warrant of which the prisoner could get the double, was the one sent to the Magistrates of Ayr; and, therefore, I think, it is the only warrant which your Lordships can take into your consideration. The third question, which I think is the most difficult, relates to the effect of the act 39th of the King, upon the statute 1701. One Judge has said, in strong and impressive language, that this act does intend to take away, and, in point of fact, does take away, the necessity of the deliverance, on the petition for bail, within the twenty-four hours. Other Judges are equally positive

that this is not the sound interpretation of the act, and 1806.
that it does not take away, in any respect, the effect of the act 1701. Betwixt these contrary opinions, what is the inferior Judge to do? or what inferior Judge in the kingdom shall take upon him to decide this question, while such high authorities appear on opposite sides? One Judge says, that such is the construction of the act. Another says, that it is totally different. One says, that he must act thus; and another says, that he must act otherwise—so that it is a matter of perfect uncertainty what ought to be done. It must be a very strong measure, indeed, in a case like the present, where a Judge is acting *bona fide*, to inflict penalties upon him, because of two modes that might be followed he has chosen one. He is acting in a ministerial capacity, and ought not to be rashly condemned. Where a Judge is acting in this capacity, he is not liable for an error in judgment, and I cannot help feeling the hardship that every Magistrate would necessarily be subjected to if they were obliged to act in one of those ways, and yet be liable in damages if they committed the slightest mistake. The act 1701 is a very valuable one, but of all statutes it is the worst expressed; and is attended, in its most important clauses, with great uncertainty and doubt. In regard to the Judges inspecting the precognition, I cannot conceive what other evidence they can proceed upon. I think they are perfectly well entitled to see the precognition. Such is my opinion upon the whole case; I cannot consent to decern against this gentleman in the present uncertainty of the law, but I would seriously recommend to the Crown Counsel, to bring in a new act of Parliament, in order that the matter may be put beyond a doubt.

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LORD MEADOWBANK.

This is a case of very great importance. Some of your Lordships have gone very deep into points of great consequence to the law of this country, and I shall therefore deliver my opinion upon all those matters that have been brought into question. I think, and there I differ from the Right Honourable Judge who spoke first, that, in times of public liberty, it is of importance that the country should form its mind fully and clearly upon what are its laws and its rights. This appears to me, when well done, to constitute the most powerful of all controuls upon Courts of Justice ; for I hold, that, in a free government, there is a jealousy, and a well-founded jealousy, of Courts of Justice, as there is of every other department of constitutional power. I think this jealousy is the great security of our monarchical system, and of our Revolution establishment ; and I think that that system, and that establishment, go to authorise that jealousy. I look upon it, that, in interpreting the act 1701, your Lordships are to consider it as a law that issued from the legislature in consequence of the well-founded jealousy they entertained of Courts of Justice, from the knowledge, which experience had taught them, that they were liable to corruption. Sensible, no doubt, our Scottish legislators were, that Courts of Justice are but imperfect instruments, and subject to all the frailties and weaknesses which enter into the construction of so frail a creature as man, out of which, however, the whole machinery of government must be formed ; and it is this feeling that ought to teach the public permanently, that they must constantly remember and reverence their rights if they hope to preserve them. Laws are a piece of waste paper if they

are not executed by faithful ministers, or at least by ministers who are compelled to be faithful. But what is the likeliest way of procuring faithful ministers? It is by teaching the public law to the people at large, and directing the current of public vengeance wherever their rights are violated. This opportunity, however, the people have not always enjoyed; for it was only at the Revolution that their feelings came to be respected, and the sentiments of the intelligent public deemed the safest repository of constitutional rights. It has been stated as a ground for changing the law by which the quantum of bail was fixed, that it was sufficient to declare, in general, that excessive bail is contrary to law—that the imprisoning persons without expressing the reason thereof, and the delaying to put them upon their trial, were contrary to law. But this would only be declaring the law as it stood before the Revolution; and the legislature knew well that this would be perfectly nugatory. They knew that it might be said, that these delays are trivial, and perhaps reasonable; and, therefore, what did they do? they said, ‘I tell you, you shall allow bail within twenty-four hours; you shall not exact exorbitant bail, and I state to you what exorbitant bail is;’—for the amount is specified, which, according to the circumstances of the times, was reckoned sufficient bail. The legislature was composed of men of worth, who had experienced the greatest evils from the corruptions of Courts of Justice, as well as from the corruptions of every other branch of public administration. They left it to the discretion of the Judge what bail should be taken in each case, but they said it would be exorbitant to take more than a certain sum, and they fixed the maximum. I do think this was wisely and prudently done; and we have the reiterated

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1806. approbation of two British Parliaments expressed as to this statute. They have never attempted to abolish the law ; they have only increased the sum ; and this very act of Parliament, of the 39th of the King, introduces, for the first time, an exception to the principle, in so far as it allows bail to be exacted without limit in the case of sedition ; influenced, no doubt, by the situation of Europe at the time, convulsed to its foundation by the rage of innovation, and by the violence with which this distemper spread like wildfire through the world. At this period the legislature ventured to put their hands to the act 1701 ; and in the single case of sedition they allowed,—and what did they allow ? They allowed this ; ‘ And whereas,’ &c. &c. Here is certainly an undoubted repeal of the statute 1701, as far as it restrained the Court of Justiciary from taking more than the maximum in the case of a certain crime. There is here an allowance for the Court of Justiciary, on application made to it, to extend the bail to such amount, as, under all the circumstances of the case, the Judges shall think sufficient. There is no direction given as to the form of the application ; —that is left entirely to the discretion of the Lord Advocate. It has been said, that the Judges, in determining upon such application, must consult the precognition. As to this I shall not say much. I shall only observe, that however proper it may be for the public prosecutor to take precognitions, and to found upon them his subsequent proceedings, I cannot think it fit for Judges to hold them as evidence. It appears to me to be confounding two duties in their nature distinct. In the ancient European governments, the Magistrate generally sat as the Judge of the law, but he was likewise the public prosecutor of offences of all kinds, (the *partie publique*,) and had confided to him the

charge of making up of dittay, that is, of instituting and conducting the process, while, at the same time, he was the Judge of the law. This was the public law of Europe; but however suitable it might be to those times, it is extremely unsuitable to times of perfect justice,—to times when justice is carried to the utmost length that human imperfection can admit. The province of an enlightened legislation should ever be to separate the function of preparing criminal proceedings from the function of applying the law to cases as they occur; and the more that Courts of Justice are prevented from mixing these functions, so much the more suitable are they, and so much the nearer do they approach to that abstract perfection in the administration of justice at which the laws of this country perpetually aim. But I certainly must consider this as a statute that has repealed a part of the statute 1701. The statute of union calls upon me to consider it as such. In this situation, Judges are the organs of the nation, to take care that their rights under a new legislature are preserved and maintained,—those rights that they stipulated for when they had a separate legislature of their own. I apprehend, therefore, that I am bound, and that your Lordships are bound, to give to British statutes the strictest interpretation wherever they trench upon existing civil rights or civil privileges; for all such rights and privileges are preserved by the *pactum conventum*, the special paction of the Union. Now, can I permit a statute to be repealed by implication, which was part of the Revolution establishment, part of the claim of right, part of the engagement under which King William, and every one of his successors, have held the crown? This act is the centre of our whole system: It proceeded from the country, in its resurrection from sinking under the in-

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1806. } juries and miseries which it had suffered from the outrages, of former times ; and is it possible for any Judge to think of repealing this statute by an inference ? I am sure I shall always enter my protest against putting a violating hand to that statute, unless I see myself directed to do it by positive legislative authority, in clear and express words. But do I see here any thing like an intention of this kind ? It is said, indeed, that the Court of Justiciary may extend the bail in certain cases ; but is it said, (as it ought to have been on this supposition,) that the statute is to be repealed as to the time allowed for consultation and deliberation ? No such thing ; but I hold that a repeal or positive enacting words would have been essential. I find the legislature had been justly jealous, justly afraid to touch, what I consider as the palladium acquired to Scotland in the Revolution establishment. They say expressly, ‘ Provided always,’ (which rides upon the whole of the clause,) ‘ that nothing ‘ herein contained shall extend, or be construed to extend, ‘ to deprive such persons of the other benefits of the acts ‘ above-mentioned, and particularly, of his forcing on the ‘ day of trial, as especially directed by the act of the Par- ‘ liament of Scotland, first above recited.’ It appears to me, that here the legislature just say, ‘ I give the Lord Ad- ‘ vocate, with the aid of the Court of Justiciary, in the case of ‘ sedition, a latitude in taking bail beyond the maximum for- ‘ merly prescribed. I am afraid there should be any pre- ‘ tence, by this means, for holding the statute repealed as ‘ to the time allowed for deliberation ; and, therefore, I ‘ prohibit and discharge all Judges from putting such a ‘ construction in the clause as shall have that effect. Do not ‘ meddle with the statute 1701 : I caution you against it ; ‘ take the remedy, imperfect as I give it you, but do not pre-

* tend to say that you can make it better. This would be 1806.
 ‘ to repeal one of the most sacred laws of Scotland, which
 ‘ were bargained for at the Union, and, therefore, do not
 ‘ think of attempting to encroach upon them.’ This is the
 language of the Act, which I can never be deaf to—‘ Pro-
 ‘ vided always that nothing,’ &c. &c. Am I to be told
 after this, that the Lord Advocate, at his leisure, that
 the Court of Justiciary, at their leisure, who, by the
 bye, must, for a great part of the year, be travelling
 at a distance from the capital, are to proceed to cog-
 nosce the bail, with all the delay attending upon the
 slow forms of law; and that the most valuable of all
 privileges, the privilege of obtaining liberty in twenty-
 four hours, is to stand suspended upon their pleasure
 and convenience. It is impossible for me to listen to
 such a doctrine. I agree with my learned brother who
 spoke first, that there may be some imperfection in the
 law as to the case of sedition; but though I see the law
 imperfect, am I to assume the capacity of a legislator, and
 to make it better. The legislature themselves saw that it
 was imperfect; but they had taken a strong measure, in
 order that a formidable crime might be repressed, and pre-
 ferred that the new measure should, in some cases, prove
 ineffectual, lest, in providing a remedy for a partial evil,
 they might shake the security of the subject all over Scot-
 land. Having said so much upon the law, I have no diffi-
 culty as to the fact. I have never changed my opinion
 upon the subject—I certainly do remain just as clear at
 this moment as I was at first, that this was here a commit-
 ment for trial, if ever there was such a commitment. I
 cannot think it is possible that it can be left to be a matter
 of ambiguity, whether a commitment is such as to en-

1806.  title a person to apply for bail? Had this warrant been presented by the prisoner to any one lawyer, would he not have told him instantly to apply for bail? What does the act 1701 say as to commitments? It only says, that you shall express in the warrant the reason of the commitment; and as there is in this warrant not only the statement of a charge against the prisoner, but an order for close confinement, it partakes not even of the form of a commitment for farther examination. A commitment for trial does not interfere with the magistrate's right of examining a second time. As to this application for bail, I do not feel any necessity for inquiring whether it was presented on the second or the ninth; I don't care which. The defender says, he considered it as a commitment for farther examination: I consider it as quite clear, that a commitment for farther examination cannot be the ground of an application for bail. A commitment of this kind is, in fact, a commitment for the benefit of the prisoner. The whole ground on which we are called on to decide, is the interlocutor delaying to give a deliverance on the petition. The plea of the defender is, that he was entitled to lay the matter before the Crown Counsel, and that, at any rate, it was but an error in judgment, and that he ought not therefore to be subjected in the penalties of the act. It appears to me, that the statute 1701, from beginning to end, is intended to deprive judges of all sort of discretion; they are to have no power; they are threatened at every moment with a specific penalty; and I consider them, therefore, as bound by the statute, in the most rigorous manner, that a legislature, jealous of their bad intentions, could mean to bind them. I think that, under this statute, it is as clear as the sun, that the Sheriff had the penalties of wrongous impri-

sonment before his eyes. And what had he on the other side? He had to fly in the face of this jealous threatening of the legislature, doubting of his intentions; trusting for safety to his inference, that time should be given to the Lord Advocate to consult the Court of Justiciary. Is it stated, however, as an offence, in this act of the 39th of the King, if he fails to consult the Lord Advocate? He had an offence indeed held out against him, in one view; but there was no offence held out to him, if he had doubted or hesitated as to his powers? It appears to me that the whole defences just consist of such pretexts as the act 1701 was levelled against. They are the grounds of that jealousy which is entertained by the Constitution in regard to the judicial power; and sitting here as a Judge of the law, and an object of this constitutional jealousy—an object of the jealousy of the act 1701, I have no hesitation to declare, that if the least weight is given to those pretexts, a period may soon be revived in the practical history of this country, similar to that from which the act 1701 took its origin. Something has been said of the character of the defender: I dare say he may be a very respectable man; but with that I have nothing to do, for, whatever he is, I have no power here to exercise indulgence or discretion. The statute is as clear as the Sun, and is intended to be clear. Whatever doubts there may be as to some points in the statute, as to whether the prisoner may be detained in jail for 40, 100, or 140 days, (as to which, however, I never saw any difficulty), the point before your Lordships is, at least, without a shadow of doubt. It is without a shadow of doubt, that you must cognosce the bail within 24 hours; you must do this under the penalties of wrongous imprisonment; and you commit no of-

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1806.  fence although you fail to consult the Lord Advocate. In my opinion, it is clear from the provisions of the statute, and clear from the meaning and sound construction of corrective laws, that we have no power to listen to any thing like a plea of *bona fides* on the part of Judges who violate the act 1701. If we have any such power, then I will agree with my Lord Newton, that there is an end of this statute, and that it may be burned in the public streets, with contempt, as useless. I did what was best—I thought so—I used the best of my judgment. These are the pretences which are uniformly set up in cases of this kind. And are your Lordships sitting here, in times of public liberty, to listen to such pleas, and yet to be called the guardians of liberty? If you do not in the present times teach a Magistrate how the law stands; if you do not teach the freemen of Scotland their rights; what would you do under a government of a different description? The reign of Charles the Second shews, that the most violent declaimers for liberty become in a short time as violent for despotism. I am always afraid of a demagogue, for I see in him a candidate for future tyranny. And I hope in God, I shall never see the time when such men shall be able to derive any aid to their purposes from the present decisions of our supreme courts. The caution of enlightened times, in adhering steadily to our constitutional landmarks, forms the best security against the recurrence of bad times. It disciplines magistrates to exactness in their public duties; and establishes in the people a firm and uniform feeling of their constitutional rights. Such is my opinion; and I deliver it under the fullest conviction, that it is the only one I can give consistently with my duty.

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LORD HERMAND.

My opinion is formed on very simple grounds. I lay all that was stated by my brother over the way altogether out of the question. I admit that the act 1701 may be very good as to its intentions; but I have considered it for thirty years of my life, as the most absurd provision that ever was put upon paper. This is not my own opinion merely; for I recollect, many years ago, when in the Court of Justiciary, my duty concurred with my feelings in wishing to throw a certain degree of ridicule on that statute, a very learned friend of mine, who had bestowed great attention upon the criminal law, said, that the framers of the act 1701 did not wish that it should be understood. There are two warrants in this case; one on the precognition, and the other sent to the magistrates of Ayr. Upon this last the prisoner was committed, and for this the defender must answer. I shall therefore read the terms of it. If I had any doubt as to the terms of this warrant, which I have not, I should think myself entitled; in endeavouring to discover the true meaning of the proceedings of the magistrates, to take into my consideration every thing that was done, *co instante*, that the man was committed; and I find a clear warrant, granted at the same time, for committing him to prison, to remain until he should be farther examined. In judging of this case, I must consider all that passed at the very moment of the commitment. It is a mistake to say, that the words 'until liberated in due course of law,' must render the warrant a warrant of commitment for trial. They can do no such thing. It is merely a general expression, which I will beg

1806. leave to say, with confidence, is not exclusively appropriated to commitments for trial. It is capable of another sense; and, in sound construction, must bear that sense in the present case, when connected with the other proceedings of the Sheriff. With regard to the admissibility of bail, I never was clearer in my life, as to any thing, than that bail does not apply to commitments for farther examination. It cannot possibly apply to such commitments. I do not care what the act of Parliament says on this subject, because I hold that there is a power paramount to acts of Parliament, and that is the power of right reason, to which Kings and Parliaments themselves must be subject. The commitment for farther examination is a necessary step of criminal jurisdiction. The magistrate has not yet done with the prisoner; he is not finally committed; and he cannot, therefore, be liberated on bail. That is my opinion. It is founded upon reason, and plain sense; and all the acts of Parliament in the world will never convince me that it is wrong. It has been said, that the sheriff's conduct explained the way in which he viewed the warrant, and imported that he understood the commitment to be for trial. This is founded upon the sheriff not discharging the prisoner, but ultimately admitting him to bail. This, however, is but an inaccuracy; and I have always been taught to believe, that mere inaccuracy is not a ground for subjecting a judge in damages. The Sheriff should, no doubt, have granted a new warrant; and had he proceeded regularly, holding that his former warrant was for farther examination, he should have granted a new warrant for trial, and afterwards admitted the prisoner to bail; but it is clear, that the course which he adopted, whether regular or not, was, at least, more

favourable for the prisoner. I own, I am not disposed to go into deep principles for the foundation of my opinion; and have always thought an argument clear, from the nature of the thing, much better, than an argument founded upon the mere words of a statute. The result is, that although there never had been another statute but the statute 1701, I, as a judge, am bound to say, that this prosecution is ill founded. But the matter does not rest here, for the legislature has had this matter repeatedly under their consideration; and, upon the last of these occasions, they passed the act of the 39th of the King. I hold, that, in interpreting this act, it is necessary to attend to the state of the country at the time when it was passed. The legislature knew that the constitution was in danger; that a regular conspiracy had been formed, in the face of the Sun, for the subversion of all established government, abetted by many persons in this kingdom, and prosecuted with the most mischievous activity. At this time, it was customary to enter into extensive subscriptions, by which the bail was rendered elusory; and it was in the view of all those circumstances that the act of the 39th was passed. The Court of Justiciary, by this act, is still bound to cognosce the bail in 24 hours; but from what time? Not from the commitment, but after the matter has been laid before them by the public officer who is directed to make the application. Must not he have inquired into the facts? Suppose, without a precognition, the Sheriff should send an information that a certain person had been guilty of sedition, what would his Majesty's Advocate do? What would any man of sense do? Would he go and tell the Court of Justiciary, that some man had written him a long story on the subject? Would the King's Advocate do so?

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1806. He would do no such thing. He would teach this Sheriff his duty; he would say to him, I desire, that, in place of sending me something without any authority, you will go and take a precognition in due form. Must not there be time for taking such precognition? It is idle to say that there was here any breach of the law; and I beg leave to state, that, in my opinion, in a case of this kind, and in the state in which the country was at the time of this commitment, the Sheriff would have been wanting in his duty, had he not taken the course which he adopted. The statute does not increase the time for cognoscing bail, but it prescribes that which, without farther time, cannot be done. And there is another thing that, I apprehend, ought to be attended to; that, if your Lordships are to adopt the construction put upon this act by the pursuer, you must hold, that the legislature is exposed to be laughed at in every remote corner of the kingdom, from which it is impossible that due information can be received, without allowing a reasonable time for that purpose.

LORD PRESIDENT,

(SIR ILAY CAMPBELL.)

Although I have not the word liberty so often in my mouth as some others, I hope, and trust, that there is not a man who now hears me, will doubt that liberty is as much in my heart as in that of any man living, be who he will, Judge or otherwise. I think, if I am not a friend to liberty, I am not a friend to the British constitution. But why should I go into topics of this kind? I am sitting here as a Judge in a private cause, and have nothing to do with these matters. I am entirely of the opinion of the Honour-

able Judge who spoke first. I have no jealousy of the legislature, on the one hand, and I cannot persuade myself that the legislature has any jealousy of me, or of any set of Judges, on the other. I am obliged to the legislature for depriving me of discretionary power; but, if any statute requires construction, what is my duty? What do I sit here for? In a question depending upon construction, must not I exercise my judgment to the best of my ability, to make the act bear a rational meaning. If there are any defects in the statute 1701, which I own I have not seen in so strong a light as some of your Lordships, then it will lie with the legislature to correct them. I say I have not seen some of the defects that have been mentioned, and I rather regret that any expression of strong general disapprobation should fall from any of us in relation to that statute. I must profess, since we are in the way of professions, that I have always considered it as the *magna charta* of our liberty, but I likewise respect every other act of the legislature. I do declare, that from the very first appearance of this case, I have only been able to take one view of it. That Mr Murdoch fell into a very great mistake and inaccuracy, in so far as he at one time put his name to two different warrants, expressed in different terms, cannot be doubted. It was an exceeding great blunder; and if I were the principal officer of the county, I do not know but I might have been provoked to say to him, I will not employ you any longer as my substitute; and, even yet, I do not know but it may be proper to think of some fine, or other punishment, for his mistake; but I am very clear that this is no offence under the act 1701. I do not think the gentlemen of the bar have treated the case properly. The first conclusion of the summons

1806.

1806. is a conclusion for damages at common law, and if his conduct had been oppressive, it would no doubt be a good ground for subjecting him in such damages. The other conclusions of the summons are copied from the act of Parliament, and relate to the penal disabilities created by it. These conclusions have been kept very much out of view. But I must tell your Lordships, that if the defender has incurred those pains and penalties, you must inflict them. There are, first, the pecuniary penalties; but these are not all, for there is another conclusion for depriving him of his office, and declaring him incapable of all public trust. Now, can any man lay his hand upon his heart, and say that this gentleman has been guilty of such a breach of the law as would warrant the depriving him of all public trust. I do not see any obligation on myself to draw this conclusion; and, neither as a Judge, nor in any other capacity, can I bring my mind to consider the matter in such a light. Let us see what it is that the act 1701 says. It is impossible for me to read it without seeing clearly that all the cases that are provided for, are cases of commitments for trial. But it is said that this man was committed for trial. As to this, however, I must look, not only at the warrant, but at the whole other circumstances of the case. Can it be said that I have formed a sound judgment if I do otherwise? I must look at what was *actum et tractatum* at the time. I must look at these two blundering warrants, and at the act 39th of the King, at the same time. When I come to the act 39th of the King, does it not say in so many words, that the bail is to be extended? Why then, how is the Court of Justiciary to exercise their powers? Is it not by laying the case before them? Is it not by doing the very thing which Murdoch

did in this case ? By sending the precognition to the Crown Counsel, along with the deliverance made out in the terms that he says he meant, although by an inaccuracy, he granted another in different terms. He says to himself, this man's crime is sedition, and here is another act of Parliament, which directs that case to be laid before the Court of Justiciary, and, therefore I must comply with it ; but it is said, no ; he might have abstained, and he ought to have abstained,—he should have said, I will not do it,—I am not obliged to transmit the precognition,—I will take it upon me, sedition as it is, to take bail as in any other common case. In my opinion, if he had acted in that way, he would have been guilty of a great breach of his duty, as a Magistrate. (*Quotation from the act 39th*). This makes it the duty of the Judge who takes the precognition, to transmit it to the Crown Counsel, in order that the application may, if they think proper, be made to the Court of Justiciary, otherwise you make this the most nonsensical, the most nugatory act that ever passed through the hands of a legislature. I think I cannot throw such a stigma on the legislature as to interpret this act differently. I think they must have had a meaning, and this meaning, such as they had at the time, must be allowed. I am not depriving this man of any benefit, it is the legislature which has deprived him of any benefit that he has lost by this act. It is said that the Crown Counsel, or the Court of Justiciary, may hang up the matter for a year, while they are amusing themselves in the country ; but I answer to this, and it is the answer of common sense, that if I could figure that the Court of Justiciary were to do any such thing, I would write to the King and Council that the Court of Justiciary were absent,—that the King's Advocate was not doing his

1806.

1808. duty; and I would say, let all those Judges be dismissed, as they have been guilty of a very high wrong. All the grievous oppression, however, in this case, was an imprisonment of twelve days, till the public prosecutor should have a reasonable time to deliberate, as to his conduct. As to the form of the warrant, I need not repeat the observations already made; it is not expressed in the sole terms of a warrant for trial; it is expressed very peculiarly and anomalously, insomuch, that I do not recollect to have ever seen a warrant in such terms before. If there was any thing inaccurate, why was it not taken notice of when he presented his petition for bail? Suppose that the petition had been presented on the second, the Sheriff must have said verbally to him, (at least, I must suppose that something of that kind passed, otherwise he would have been required under form of instrument), I cannot give any deliverance on this petition. I have sent your precognition to Edinburgh. I did not mean to imprison you for trial, it was only for farther examination. He presents his petition on the 9th, and what is the answer that he gets? I did not commit you for trial; it was only for farther examination. Look at the act 39th of the King, and you will see whether I committed you in the one way or the other; the Court of Justiciary must have a petition presented to them, in order to determine the bail upon which you are to be liberated. That I conceive to be a proper answer, and some such answer must have been made, as immediately on its coming from Edinburgh, he is set at liberty. I apprehend that every thing went on regularly under the acts of Parliament, excepting the inaccuracy that Murdock fell into. Of this, however, the prisoner made no complaint,—he made no demand by protest or any thing else. He was satisfied

with the answer, and the question is, whether on the ground of a mere inaccuracy the Sheriff is to be subjected in the pains of the act of Parliament. Every warrant, it seems, issued by the Court of Justiciary, is in the terms of this warrant; and, when ever a person is apprehended under these warrants, he may either be liberated upon bail, or his liberation may be deferred until he be farther examined. The words, liberated in due course of law, do not allude to any particular form of imprisonment. There is no law transgressed by the form of this warrant; the fact is, that this man has suffered nothing. If his imprisonment had been in Edinburgh, it is admitted that recourse might have been had to the Court of Justiciary; and it is absurd in the highest degree, to hold that the same recourse is not competent, merely because he resides at a distance. The act appears to me, to require, in general, that time shall be given for applying to that Court, to know whether the bail shall be encreased or not; and, therefore, I think this man has nothing at all to complain of, and, consequently, I am for assoilzieing the defender. As to inflicting any fine, or censure, or other punishment, upon Murdoch, if your Lordships are of opinion that any such thing should be done, it will be necessary to consider what is to be the kind and degree of it.

The Court then pronounced judgment, assoilzieing Mr Murdoch from the conclusions of the action.

THE CASE

OF

DONALD M'ARTHUR,
PASTOR OF A DISSENTING CONGREGATION AT PORT
BANNATYNE, IN THE ISLAND OF BUTE;

AGAINST

JOHN CAMPBELL, ESQ. OF SOUTHHALL.

1808. **M**R DONALD M'ARTHUR, the pastor of a dissenting congregation at Port Bannatyne, in the Island of Bute, brought an action against John Campbell, Esq. of Southhall, upon the ground that the latter gentleman, on the 20th of October, 1805, while Mr M'Arthur was celebrating divine service in the midst of his congregation, had violently seized upon his person, forced him on board a vessel bound for Greenock, and having landed him a few miles from that place, had, after confining him in a small inn during the night, marched him along the road as a common felon, and delivered him to Captain Tatham, the regulating officer for that quarter, as a fit person to serve in his Majesty's navy. That officer, accordingly (as was farther stated,) sent him immediately on board the *Tourterelle* frigate, which speedily conveyed him out of the

jurisdiction of the Scottish Courts. After being detained 1808.
 for five weeks on board different ships of war, and suffering, as he alleged, every species of indignity and hardship, Mr M'Arthur was discharged by express order of the Lords of the Admiralty, and furnished with a certificate that he was never again to be impressed into his Majesty's service.—The action concluded against Mr Campbell for £.2000 damages, with expences.

The cause came before Lord Meadowbank, as Lord Ordinary, when Mr Campbell denied several of the most aggravating circumstances of the case. In particular, he alleged, that the pursuer was in the practice of preaching immoral and seditious doctrines; that he was a fit object of the impress, having been formerly employed in the herring fishery, and being, consequently, a seafaring man; and that, under these circumstances, acting *bona fide* as a Justice of Peace, he conceived himself fully entitled to deliver him to Captain Tatham. Upon this state of the pleadings, the Lord Ordinary gave judgment in the following terms.

‘ Having advised this process, finds it is not now controverted on the part of the defender, at least not articulately denied, that the pursuer quitted the seafaring occupation in the year 1801, which he had formerly in some measure practised as a curer and carrier of herrings; that he thereafter betook himself to preaching, exhorting, and solemnizing public worship as a protestant dissenter from the Established Church; that on the 29th August 1804, he was ordained as a Baptist preaching elder, pastor, or minister, by persons of that persua-

1808. vised by the Judges of the Second Division, who delivered
their opinions as follows :

LORD ROBERTSON.

I am fully aware of the propriety of protecting inferior Magistrates in the fair exercise of their authority, and of discouraging actions of damages against them, founded upon alleged errors in judgment. But, on the other hand, I never can forget, and I never shall forget, while I sit here, that it is the duty of the Judges of the Supreme Court to protect the liberty of the subject. Therefore, wherever an action of damages is brought for any invasion of that liberty, it is incumbent on the Magistrate to shew that his conduct has been regular, and that if he has committed any error, it is merely an error in judgment, for which he is not liable. In the present case, the pursuer has been impressed by the defender, I think illegally ; for, in the first place, he was not liable to the impress at all ; because, although he seems to have used the sea as a profession for some time, yet he had *bona fide* given it up, and betaken himself to another line of life. I am bound to believe that fact, as Mr Campbell has declined entering into any proof of the contrary. With respect to the plea, that the pursuer is not entitled to be considered as a preacher, not having complied with the requisites of the act of Parliament, in registering his meeting-house, and so forth ; it is very possible that, in this way, he may have exposed himself to a suit at the instance of his Majesty's Advocate, but that is not the present question. Suppose that when he had abandoned the sea, he had set up

a trade as an artisan in some royal burgh, he might, no doubt, be liable to an action at the instance of the incorporation, for encroaching on their exclusive privileges, but still he must be held to have entirely relinquished the sea, and to be no longer subject to the impress; and that is sufficient for the present question. A good deal has been said about the nature of his doctrines, but this I lay entirely out of the question; whatever they were, they are of no consequence to this cause; for, 1st, there was no complaint made to the defender, as a Justice of the Peace, on the subject; 2dly, there is no evidence that he made any inquiry; 3dly, he had no jurisdiction to take cognisance of any such offences; and, lastly, though he had, I never heard that to serve on board of a man of war is the proper punishment of heresy. It is said, that the defender acted as a Justice of the Peace:—I rather think he acted as a constable. It is, no doubt, the duty of a Justice of Peace to enforce the law as far as it allows the impressing of seamen; and if he is informed of any seafaring person skulking in his neighbourhood, he may grant a warrant to bring him before him; but, in this case, there is no petition given in to the defender—no information laid before him—no warrant granted. I cannot conceive upon what grounds he can allege that he acted as a Justice of the Peace. Has a Justice of the Peace any power to come, without warrant, authority, proof, or investigation of any kind, or any measures of a legal nature, and, *brevi manu*, to lay hold of a person, and send him on board a man of war?—I have no conception that such proceedings can be justified; and, therefore, although I must say that I could have wished one or two expressions in the interlocutor not to have been used, yet I think it substantially right.

1808. ' sion; that in the same year he became pastor of a Bap-
 ' tist meeting at Port-Bannatyne, which possessed there a
 ' particular place of worship; that the fact of the pursuer's
 ' situation at Port-Bannatyne was well known to the people
 ' on the Argyleshire coast, opposite, viz. at Collintra-
 ' Ferry, and neighbourhood thereof, where the defender
 ' was resident; that on Sunday, the 20th October, when
 ' peaceably celebrating public worship on the sea-shore
 ' near that Ferry, along with a number of persons assem-
 ' bled near him, the defender, without any previous re-
 ' quisition to the pursuer to desist from performing wor-
 ' ship there, and without any warrant against the pursuer,
 ' proceeded, with assistance of others, to disturb and in-
 ' terrupt the worship of God, and seize violently on the
 ' person of the pursuer, and then carried him by sea to
 ' Greenock, delivering him into the hands of the officer
 ' regulating the impress there, to be impressed into his
 ' Majesty's navy; that he was thence carried to Ireland
 ' as a seaman, with such speed, that an interdict, granted
 ' by Lord Bannatyne, could not be served in time to pre-
 ' vent that measure; that an application in Ireland for a
 ' writ of *habeas corpus* was also defeated by the pursuer's
 ' being carried to the Downs; that when there, he was
 ' discharged by an order of the Lords Commissioners of
 ' the Admiralty of 27th November 1805, who were pleas-
 ' ed also to grant him a protection against impressment in
 ' time to come; that the defender does not allege that he
 ' was possessed of any press-warrant when he used this
 ' violence against the pursuer, or that he had any other
 ' motive for it, than that he disapproved of the pursuer's doc-
 ' trines as being adverse to the lawfulness of war, except
 ' the allegation that he had been guilty of seditious speeches;

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though he declines to condescend as to such speeches, or the time or place of uttering them; and being of opinion, that if the defender really believed that the pursuer's doctrines were adverse to the lawfulness of war, the oppression was the more grievous of getting him impressed into the navy to serve in war; and that the whole proceeding was highly scandalous and unjustifiable; and that it is aggravated by the attempts to justify it in this Court, and by the allegation that the Lords of the Admiralty must have been misled by the representations of fanatical sectaries when they gave the pursuer a discharge and protection; and also by the hurrying away a person dedicated, as he was, to religious functions, without communication with his wife and family of that event, without any investigation or form of law, and without affording an opportunity for the Courts of Justice to interpose in his behalf: Therefore, on the whole, repels the defences, whether founded on the pursuer's having once been a seafaring man, or on the religious doctrines he is said to have taught, or on the seditious speeches which it is stated that it was rumoured he uttered; and refuses the representation, and adheres; and further, finds the pursuer entitled to L.105 sterling, as a solatium for the wrong he suffered; together with indemnification of the expences incurred by him, personal or otherwise, in obtaining his deliverance, and expences of process; and ordains accounts thereof to be put in; and decerns.'

Mr Campbell presented a petition against this judgment to the whole Court, to which answers were made by Mr M^r Arthur; and the cause was, upon these pleadings, ad-

1808. acted, they found no damages due. This judgment was carried by appeal to the House of Lords, where it was afterwards affirmed by Lord Mansfield. When I look at this case, I never can go into the idea of awarding damages against a gentleman acting *bona fide*, and merely delivering a man to the regulating officer, leaving it to him to judge whether he is a fit object of the impress or not; for, as to what followed, I hold that the defender is not liable for it; and, if the pursuer considers himself aggrieved, he must seek reparation from Captain Tatham. I see the Lord Ordinary has found that there was no *mala fides* on the part of Mr Campbell; and, therefore, I say, that if *bona fides* was sufficient to warrant the proceedings of the Justices in the case I have mentioned, it must be more than sufficient to justify Mr Campbell in this instance. I am satisfied that he acted without any *malus animus*; indeed, the contrary is not alleged; there is no ground of resentment specified, nor any previous quarrel said to have taken place; and, in these circumstances, I never can find him liable in damages at all, much less in the large sum of damages awarded by this interlocutor.

LORD GLENLEE.

I own I rather think the interlocutor is right. As to *bona fides*, there is a great distinction betwixt the case of a person endeavouring fairly to attain his end by the means which he employs, and one who uses the means for some object different from what he professes. A man must not do evil that good may come. It is a most essential circumstance in this case, that although Mr Campbell affected to have no other end in view but to serve the

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public, his real purpose was to get quit of a man who, he says, was guilty of improper conduct. Now, when I see a man endeavouring to obtain even a good object by indirect means, I have no idea that it is possible he can be in *bona fide*. The great objection to his proceedings is, that there was no complaint—no inquiry into the circumstances. It is very likely that the pursuer was in that situation that rendered it proper to examine his case. There is no doubt that he was once at sea, though it is equally clear that he had abandoned it for such a time as, joined to the character he had taken up, exempted him completely from the impress. It is said that the defender did not know of the pursuer's having got a meeting-house; and this shews that he was not at the pains to make any inquiry upon the subject; while, at the same time, it does not appear that he had any reason to doubt the fact of the pursuer's being entirely divested of his former character. From all this it follows, that he must be liable in damages for the injury which the pursuer has suffered while in the hands of those to whom he was carried; for I think the defender is answerable for all the indirect, as well as the immediate consequences arising from the injury. The case is very different of Justices of the Peace examining into facts, and deciding according to the best of their judgment, and not examining at all; so that the case of the riots at Montrose is not applicable: but if the Justices there, even with a good object, had made use of the comprehending act for a purpose which it would not have authorized, it could never be said that they were acting *bona fide*. I think the damages here could not be less; and therefore I am for adhering to the interlocutor.

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LORD JUSTICE CLERK.

From the manner in which the circumstances of this case were stated in the petition, I at first thought the interlocutor wrong; but on considering the matter, and seeing from the answers how the fact really stands, I now think it is right; and if I were disposed to alter it at all, it would be to find higher damages due. In the first place, I hold the fact to be fixed from its not being denied by the defender when called upon, that this man did *bona fide* quit the sea in 1801, under circumstances which entitle us to say, that he had quitted it altogether; and not as a temporary measure to secure himself from the impress. In what situation a seaman can be fairly said to have quitted the sea as a profession, is, in general, an arbitrary question, depending upon particular facts and circumstances. In the case of Marshall, where two of Mr. Cunningham the jeweller's men were impressed, and presented bills of suspension, they had different fates. One was an apprentice, and the other a journeyman; neither of them had been long absent from the sea. The man who had bound himself was held to have thus given complete evidence that he had abandoned it permanently, since in fact he had no power to return to it: but as to the other, who had begun merely to work at day wages, this was not held to be such a dereliction of the sea as to exempt him from the impress. Here, however, your Lordships have an abandonment of four years standing, fixed to have commenced in 1801, and lasting till 1805. This is certainly a long period; and it is not alleged that it was interrupted by any occasional returns to the sea.--

It is not said, that during the summer he had resumed his former business of a herring-curer, preaching only in winter. It is said that he was not a preacher; but it is clear that he had so far dedicated himself to the service of religion, as to be regularly ordained; that is, he had got a church. Under these circumstances, the question is, first, whether he was at all liable to the impress; and, secondly, whether he was impressed *bona fide* by the defender. Now, it is plain that he was not liable to be impressed, even by Captain Tatham himself; and I don't think that this gentleman was at all called upon to interfere: For, what is his justification? He says that he acted as a Justice of Peace: But it is not the business of Justices of the Peace to take up seamen. He quotes, however, certain letters written to the Lord Lieutenants of counties, in the year 1803. Now, upon that occasion, the administration certainly did write circular letters to the Lord Lieutenants of counties, desiring them to recommend to the Magistrates to give information to the proper officer of any seamen that might be skulking in their neighbourhood. This, however, was not a standing impress warrant; it was only to last for ten years; and the proper course for any Magistrate who had heard of such men, was to give information to the regulating officer, whose duty even then would not have been to impress them *brevi manu*, but simply to seize them, and then to inquire, in the first place, whether they had ever been at sea; and, secondly, whether they were still liable to be impressed. The doctrine held by this gentleman, I fear, would transform every Justice of Peace into an impress officer. Still the question is, under this mistaken idea, did he act *bona fide*; and, on the whole, I am clear that he did not,

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1808. though with good intentions. It is evident that he made the impress service a *color quasitus* to get quit of this man ; —I dare say he thought he was rendering the country some service in doing so ; but it does not follow that he is justified in the measures which he actually adopted.

The speech of the Lord Ordinary was exactly in conformity to his interlocutor.

The sentence of the Lord Ordinary was affirmed, with expences.

Counsel for the pursuer, the Hon. Henry Erskine ; Inglis and Robertson, W. S. Agents. Counsel for the defender, John Clerk, Esq. ; J. Campbell, W. S. Agent.

THE CASE

OF

ROBERTSON, FORSYTH, AND CO.

MERCHANTS IN GREENOCK,

AGAINST

STEWART, SMITH, AND OTHERS,

UNDERWRITERS IN GLASGOW.

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IN spring 1805, the ship *Ruby*, belonging to Robertson, Forsyth, and Company, sailed for Halifax in Nova Scotia, whence she was to return to Britain with a cargo of wood. In the month of August 1805, intelligence was received that the vessel *Ruby* having performed her outward voyage in safety, was about to return to Britain, and different insurances were in consequence made upon the ship and cargo. The ship was insured to the extent of L.2500, the sum at which she stood valued in the policies. Of this sum, L.1500 was insured at Greenock, and L.1000 at Glasgow. The voyage insured was at and from Halifax to the discharging port in Britain, with leave to call at Quebec for any purpose whatever.

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1809. The Ruby sailed from Quebec on the 24th August 1805, with a cargo of timber for Plymouth; and, on the 16th of September, was captured by the Vaugador of St Andero, a Spanish privateer. She was plundered of every article of rigging, sails, &c. which could with safety be taken from her. The master and all the crew, except two men and two boys, were put on board the Vaugador; and in this situation the prize was dispatched for France.

On the 18th of October, the owners received intelligence of the capture by a letter from the Captain, who, after having been detained on board the privateer for two days, was put on board of an American vessel, and landed at Dover on the 13th October.

Upon the receipt of this intelligence, the owners gave intimation of abandonment to the underwriters in Greenock; and wrote, on the same day, to the brokers in Glasgow, to give a similar notification to the underwriters there, which was accordingly done on the following day. The master's protest was laid before the Greenock underwriters in evidence of the capture, and returned by them with a declaration, that they were perfectly satisfied, and would settle for a total loss. It was then transmitted for the same purpose to the underwriters in Glasgow, who referred the matter to two of their own number, by a letter signed by them on the 21st October; and, after remaining for three days in the possession of these gentlemen, it was returned by them on the 24th to the brokers, with a notification that they were completely satisfied.

On the afternoon, however, of the 24th, intelligence 1809.
was received that the Ruby had been recaptured by a 
Guernsey privateer, and carried into that island. The underwriters, in consequence, declined to settle for a total loss, contending that the owners were bound to take back the vessel, and only to claim for the average loss.

In order that no injury might happen to the vessel from lying unclaimed, the Greenock underwriters agreed to take charge of her for all concerned, reserving the question for the decision of two gentlemen at Lloyd's, to be mutually chosen by the parties. The vessel was accordingly claimed in terms of this agreement, and carried safe into Plymouth, where she discharged her cargo in the end of November.

The award of the referees being in favour of the owners, the Greenock underwriters, and one of the Glasgow underwriters, settled for a total loss.

The other insurers in Glasgow, however, who had declined to accede to this agreement, still refused to pay for a total loss; and the owners brought their action before the Judge-Admiral, who gave decree in their favour, with expences.

The cause was then brought before the Court of Session by suspension, and a good deal of procedure took place; in the course of which, in addition to their argument upon the general question, the underwriters maintained, in point of fact, that the vessel had been originally overvalued; that there had been no complete aban-

1809. donment, but only an attempt to abandon, before the news of the recapture arrived; and that, even if there had been a complete abandonment, the owners had subsequently departed from it. They failed, however, in establishing any of these facts; and the Lord Ordinary (Woodhouselee) having given judgment in favour of the owners, the underwriters gave in a petition to the Court, which was advised, with answers, on the 10th of February 1809, when their Lordships delivered the following opinions upon the question.

LORD ARMADALE.

This is a case of great importance; and it is perhaps attended with some difficulty, if the decision which has been referred to is to be considered by us in forming our opinions. The petition contains two grounds for depriving the owner of the vessel of his right of abandonment, and claim for a total loss, even supposing that right to have been originally possessed by him, and to have been legally exercised. These I shall first consider in a very few words.—It is said, in the first place, that there was an overvaluation and unfair insurance, the vessel being valued at L.2500, while in fact she was not worth near so much; and if this statement were well founded, there could be no doubt as to the result. But, when I examine the evidence produced in support of it, I think it amounts to nothing more than mere inferences attempted to be drawn from the price at which the vessel was afterwards sold, although by that time her situation had become entirely different. She had suffered some damage from the enemy, and was after all sold without competition. In-

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deed I observe, that one of these very underwriters has since insured the vessel at the same value; and, therefore, from any thing yet laid before us, I must hold this plea as not established in point of fact. The other plea is, that after this vessel was captured, and abandoned by the owners, they themselves had taken charge of her, and thus abandoned their abandonment. But, when the fact is explained, it is perfectly clear that what was done in this way was not done by the owners, but by the Greenock underwriters, who seem to have acted with the utmost fairness and liberality. Seeing that there was ground for abandoning the vessel, they took charge of her for the benefit of all concerned: and this proceeding on their part, the petitioners would now persuade your Lordships was a departure from the abandonment by the owners;—a statement for which there is no foundation in the evidence. The case then resolves into a question of very general importance,—namely, how far, under the circumstances that occurred, there was an abandonment to which your Lordships are bound to give effect. The facts are clear, and fully established. In 1805, the vessel was proceeding on her voyage from Halifax to Great Britain;—on the 16th of September she was captured;—the master was put ashore; and there is some evidence to shew that she sustained damage from the enemy, the expence of repairing which amounted to a considerable sum. The accounts of this event arrived at Greenock on the 16th of October, accompanied by a letter from the captain, informing his owners of what had happened; and they, without losing a moment, conceiving that there was a total loss, an incident against which the policy expressly provides, immediately notified to the

1809. different underwriters that they abandoned the vessel. This intimation was given instantly; and the Glasgow underwriters, upon this transfer of the right and ownership of the vessel, proceeded so far very properly. I don't think there was a reference; nor was there any occasion for it. Once the abandonment is made, there is no occasion for any thing but to pay the money; and, accordingly, all that is done is to look at the papers to see whether there was a capture. But, on the evening of the 24th day of October, accounts arrived of the recapture of the vessel; and, after all that has taken place, the question now is, whether the underwriters are entitled to insist, that, notwithstanding the capture and the abandonment duly intimated—notwithstanding the subsequent proceedings between the parties, the transaction shall be totally overturned, and the owner's claim restricted to a partial loss in place of a total loss. I own it appears to me that there is no foundation for such a plea, either in the terms of the policy or in the principles of justice or expediency. It is proper and necessary that a line should be drawn when this transfer of ownership shall be complete. There is no line more proper—more suitable to the strict terms of the contract—more consistent with justice and expediency, as applicable to the rights of the parties, than that, where a fair and full right of abandonment has been exercised, upon the view of a total loss at the time, against which the policy provides, the right of the insured to recover the amount of that loss, shall then be complete; after which, the underwriter shall not be permitted to undo the transaction, merely because subsequent emerging circumstances have rendered it for his interest to do so.—


I see nothing in a policy of insurance which entitles a party to say, that where an abandonment, arising from a total loss, has taken place, where the owner of the vessel has divested himself of his right, and declared to the underwriter that the vessel is thenceforth his property, he shall, nevertheless, at any distance of time, be permitted to invert the whole right of the parties. There is no foundation for such a plea in the terms of the contract, and still less in the principles of justice and expediency. It so happened, that this vessel was recaptured and brought into port after a short interval of time. But it might have happened otherwise; and we must look to cases of that nature in judging of the present. Suppose a vessel, sailing upon a foreign voyage, is captured in the Channel—abandonment made, and the underwriters concluded;—but shall it be said, that, for an indefinite length of time, they are to keep the whole contract in suspense, and the parties uncertain as to the situation in which they stand? In short, this is a question on a contract of insurance under which the rights of the parties cannot be kept afloat, or permitted to depend upon any future contingencies, otherwise it would be productive of the greatest injury to all parties;—to the owners of the vessel, who have fairly abandoned her, and are entitled to claim as for a total loss under the policy; and to the underwriters, who, from the date of the abandonment, may justly consider themselves as fully invested with the property of the ship. As to the cases that have been mentioned, it is clear, that, where accounts of recapture have arrived at the same time with those of capture, the parties are placed in a situation totally different. There they are plainly entitled to claim

1809.

1809. as for a partial loss, and not as for a total loss; but the principles of such cases do not in the slightest degree touch the present. We must here draw the line; and I think no better line can be drawn than that, where a fair abandonment has been made by the owners, and accepted by the underwriters, it must be held as a fixed and concluded transaction. It is said that the contract of insurance is a mere contract of indemnity; and this is so far very true: but the owner of the vessel is seeking no more than indemnity, when he claims as for a total loss, after having surrendered his vessel to the underwriters. The underwriter has obtained the property of the vessel subject to the loss under the policy; and I can see no danger to the interest of any party, in giving effect to a right recognised by the policy, and so exercised as to leave parties fully apprised of the situation in which they stand.

LORD HERMAND.

As I agree with almost every thing which your Lordships have heard, I shall say but a few words in this case. Certainly this petition did excite some doubt in my mind. The argument is, that the ship was first captured and recaptured; and that then there was not an abandonment, but merely an attempt to abandon on one side. I take all this to be completely erroneous from beginning to end. It is demonstrated in the answers, that the abandonment took place while the ship was believed to be in the hands of the enemy. She was captured on the 16th September, and the news arrived in Greenock on the 18th of October. On that very day, notice of the abandonment was given;

may, more, a reference was entered into to Messrs M'Mil- 1809.
 lan and M'Culloch, and, on the 24th, an award was given, 
 as for a total loss. How is it possible that all this can
 be got the better of by the referee himself? As to re-
 linquishing the abandonment, it appears to me that the
 respondents never did so, by assuming the management
 of the vessel, which was done by the Greenock under-
 writers, and was in truth a confirmation of the abandon-
 ment. We are told that a contract of insurance is a con-
 tract of indemnity; and upon this subject my opinion
 coincides entirely with the doctrine stated by Lord Mans-
 field, in the case of *Hamilton versus Mendes*, referred to
 by the respondents. The Noble Lord says, ' I desire it
 ' may be understood, that the point here determined is,
 ' that the plaintiff upon a policy can only recover an in-
 ' demnity, according to the nature of his case at the time
 ' of the action brought, or at most, at the time of his
 ' offer to abandon. We give no opinion how it would
 ' be, in case the ship and goods were restored in safety
 ' between the offer to abandon and the action brought,
 ' or between the commencement of the action and the
 ' verdict; and, particularly, I desire that it may not be
 ' inferred that, in case the ship or goods should be re-
 ' stored *after the money is paid as for a total loss*, the in-
 ' surer could compel the insured to refund the money,
 ' and take the ship or goods. That case is totally diffe-
 ' rent from the present, and depends throughout upon
 ' different principles. Here the event had fixed the loss
 ' to be an average loss only, before the action brought,
 ' before the offer to abandon, and before the plaintiff had
 ' notice of any accident; consequently, before he could
 ' make an election. Therefore, under these circumstan-

1809. ' ces, we are of opinion, that he cannot recover for a total loss, but for an average loss only, the amount of which is ascertained by the jury.' This I take to be exceeding good law; and as I think it applies clearly against the argument of the petitioners, I found my opinion in a great measure upon it. There was here no reason to expect a recapture; the insured acted under that impression, and fairly abandoned the vessel, in the view of a total loss. All this, however, is digression; as the sole question at present before us regards the relevancy of the facts stated in the petitioners' condescendence; all of which are shewn, to my conviction, to be either disproved or irrelevant. The first article simply states the fact of the insurance. The second states, that the vessel was captured by a Spanish privateer; and that the injury done to her did not exceed L.10 or L.20 in value, whereas it appears, that before she could put to sea, the expence of repairs alone amounted to nearly L.300. In the third article, it is said, that notice of the abandonment was not given; but it is clear that due intimation to that effect was made, from the circumstance of the reference, and the transactions which followed upon it. Then, as to the averment, that the chargers paid the salvage to the captors, it is disproved, it being clearly shewn that this was done by the Greenock underwriters; and though the fact had been otherwise, it is nothing to the purpose. In like manner, the statement with regard to the sale at Plymouth is totally irrelevant, as it is clear that the respondents had no share in the transaction. The case which has been printed resembles the present in some particulars; but all I shall say is, that if it is to be held as precisely similar, it has been *male judicata*, though there

is one material circumstance in which the cases differ *toto*
circo; namely, that here there was an abandonment deli-
berately made and accepted, followed by a reference for
settling the loss; while, in the other case, there was simply
an offer to abandon, which does not appear to have been
accepted when the news of the recapture arrived. After
all, I think the question is to be ruled by the principles
laid down by Lord Mansfield, in the case of Hamilton
and Mendes.

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LORD BANNATYNE.

It appears to me that the insured proceeded with the
greatest fairness, and that the underwriters were com-
pletely satisfied of there being a regular valuation. It is
said that an abandonment had not been made before the
news of the recapture arrived; and if that had been the
fact I should have viewed the matter very differently.
It is no doubt true that a contract of insurance is a con-
tract of indemnity; but where a capture takes place,
there is every reason to believe the loss to be total. It
may indeed turn out to be a partial loss; but, in the mean-
time, it is a matter of discretion with the insured, whether
he will claim as for a total loss, or suspend that claim
upon the chance of a recapture. When he has once ex-
ercised his discretion, however, by making a fair aban-
donment, he is entitled to a total reimbursement; and
what is then done cannot afterwards be undone. A very
short time indeed elapsed, in the present case, between the
capture and the recapture, but it might have been much
greater; and during all this indefinite period, is he bound
to suspend his whole transactions in the expectation of a


1809. recapture? My opinion is, that he is not, whatever may be said of cases where the news of the recapture arrives before the abandonment.

LORD PRESIDENT (BLAIR.)

This is certainly a case of some difficulty, and entirely new. So far as we know, there is no direct authority applicable to it, either in the English law books, or in the Decisions of the Courts, except the report which has been printed and laid before your Lordships. It is nevertheless our duty to decide; and the novelty and difficulty of the case can only serve as some excuse for us, in case we shall happen to be wrong. What has occurred to me upon the subject coincides entirely with what I have heard, and therefore I shall make but a very few observations. At first view there is something in the case which does create a little doubt; and it is this, that at the time when the abandonment was made, and the underwriters required to settle on the footing of a total loss, if the true state of the fact had been known to the parties, there was no ground for any abandonment. The insured had no title to abandon, and the insurers might have said, we will not accept of an abandonment; there is not a total loss, there is only a partial loss. But I take it to be the fundamental basis of insurance law, on which must depend every transaction betwixt the insurer and the insured, that you are not to consider the facts as they really are at the date of the contract, because it often turns upon facts which are long ago past. If the parties do not know the facts, it signifies nothing to the validity of the insurance; their rights do not depend upon the real state

of the fact, but only upon the fact so far as it has 1809.
 come to their knowledge at the date of the contract. A 
 vessel is insured which has sailed some months ago ; the
 insurer and the insured know nothing of her safety, or
 whether she may not have been totally lost ; yet it is of
 no consequence to the policy, because, according to their
 intelligence and belief, she is subject to the risk of the
 voyage. It would be perfectly absurd to say that all this
 proceeded upon a mistake, and that the insurance was to
 be void, because, in fact, the vessel was not in existence at
 the time it was made. The parties proceed upon facts,
 not as they really are, but as they believe them to be
 from the intelligence in their possession. In the present
 case, when the news of the capture of this vessel arrived
 at Greenock, and came to the knowledge of the insured,
 she was a captured vessel, and they were entitled to pro-
 ceed upon that footing. At the time they made the aban-
 donment she was a vessel lost, with only a chance of the
 loss being repaired by a recapture. In this situation I
 cannot doubt that this was a total loss, which founded the
 insured in a right to abandon. The chance of a subse-
 quent recapture signified nothing ; and therefore it is so
 far clear, that the insured went upon solid grounds when
 they made the offer. They did no more than what they
 had a right to do ; and the underwriters had no title to
 refuse it, because no intelligence of a recapture had then
 arrived. An offer to abandon is made, under circum-
 stances which justified it ; that offer is not refused, but
 accepted of by the underwriters at Greenock, and the
 matter settled. As to the Glasgow underwriters, a letter
 is sent to the broker, desiring him to notify the abandon-
 ment to them. He did so accordingly ; and we have evi-

1809. dence that they accepted of it, because they appointed two of their number to settle the loss. The award for the amount of the loss was not signed, and there was no reason for it, because, the abandonment being made, the right of the insured was then complete. To enable the broker to settle the loss, the protest was sent to him, with which he writes that the underwriters were satisfied. There is evidence also, that the broker had made a statement of the loss, although it is not signed by the referees. In short, not only is the abandonment made, but accepted of, and measures used for making a settlement of the loss. Then came news of the recapture of the vessel, which was latterly carried into the place of her destination. Upon this the question arose, whether the underwriters were entitled to insist, that, notwithstanding all that had taken place, this event was to undo every thing, to throw every thing loose, and compel the assured to take back their ship, and settle upon the footing of an average, in place of a total loss. A dispute also arose, which of the parties was to take charge of the vessel. It is clear that this was done by the Greenock underwriters; but, although it had not, it would not make the least difference upon the question, because the rights of the parties must have been preserved at the time. I think it should always be done by mutual agreement, the rights of parties being subject to after discussion in a court of law. But, whether this was done or not does not signify; and therefore the question just comes to be, After an abandonment made, and steps taken for paying the loss, does the intelligence of a subsequent recapture, which converts it from a total to a partial loss, entitle the underwriters to throw every thing loose? I conceive that the underwriter has

no such power, after a settlement had gone so far. I 1809.
 see no such power mentioned in our law books; and, 
 were it to be permitted, it would lead to the greatest confusion and embarrassment in the affairs of merchants, whose great object is to have all their transactions immediately closed and settled, and to whom it is of the highest consequence to know whether they are to receive back their ship, and so claim for a partial loss, or to be paid at once the whole sum assured. I shall only say, that, if such a power is to be allowed the underwriter, it ought to be limited to a certain period; because, according to the argument maintained by the petitioners, although the news of the recapture had arrived at the distance of weeks or months, they were still entitled to overthrow the whole transaction. Then, let us reverse the case: we have here the underwriter insisting that the abandonment shall be undone;—it might happen to be for his interest that the reverse should be the case. Suppose the insured on goods made an offer to abandon, and that after matters had been settled, the goods should, by a sudden rise of prices, become greatly more valuable, so as to make it for the interest of the insured to get back his goods, would it be tolerated that the insured, after they had said, we abandon to you the goods, and will claim our money, to come back, at any distance of time, and reclaim the goods, because they found them more valuable? It appears to me to be clear, on grounds of law and justice, that no such plea ought to be listened to. My opinion is for adhering to the judgment.

Counsel for the petitioners, R. Craigie and R. Forsyth, Esqrs.; Agent, Andrew Steele, W. S.—For the respondents, J. Clerk, F. Jeffrey, and A. Skene, Esqrs.; Agents, Gibson, Christie and Wardlaw.

(SECOND DIVISION.)

THE CASE

OF

DAVID SNODGRASS BUCHANAN

OF BLANTYRE PARK, ESQ. *Pursuer,*

AGAINST

MRS JANET BUCHANAN,

SPOUSE OF MR CHARLES MACNAB, RESIDING IN ST NINIANS,
AND HIM FOR HIS INTEREST, *Defenders.*

1810. **T**HE late Mr Dugald Buchanan of Craigievearn died about the year 1774, without any lawful issue, but leaving a natural daughter who had lived in family with him from the period of his marriage to that of his death. By this last event the estate of Craigievearn, in consequence of the failure of male relations, devolved upon *Miss Janet Buchanan* who resided in Edinburgh, the sister of the deceased, burdened with a jointure of L.200 a year to his widow, *Mrs Buchanan* of Craigievearn. Between these two ladies a law-suit took place, relative to some of

the property left by Mr Buchanan ; and this, joined to 1810. some other irritating circumstances, entirely alienated them from each other.

After Mr Buchanan's death, his natural daughter, who was named *Janet Buchanan*, resided with his widow, and was educated and brought up in a manner suitable to the station of her father. But, in the year 1789, in consequence of a difference with the old lady, she quitted Glasgow and went to Edinburgh, where she met with a cordial reception from her father's sister, Miss Janet Buchanan. She was never afterwards reconciled to Mrs Buchanan, but lived with Miss Janet Buchanan, who had contracted a great partiality for her ; insomuch that upon her own death, which happened in 1792, it appeared that she had left her the bulk of her fortune.

In 1807, Mrs Buchanan of Craigievearn died, leaving regular deeds of settlement, by which she conveyed her whole real and personal property in favour of her heir-at-law, Mr Snodgrass of Cunninghamehead.

In the mean time, Miss Janet Buchanan had married Mr Charles Macnab, who appeared at the opening of Mrs Buchanan's repositories, and produced a settlement upon his wife, by Mrs Buchanan, in the form of a letter to the late Miss Janet Buchanan of Craigievearn. This letter, or deed of provision, is dated in the year 1786, long prior to the date of the settlements executed in favour of Mr Snodgrass, and is conceived in the following terms:

1810.

Glasgow May 17th 1786

DEAR MADAM

I am surprised to understand from your niece Jenney
 that you want her to leave me and go to yourself this
 is not what I expected after agreeing and your con-
 senting and allowing her to continue with me and my
 late brother William at the rate of three hundred
 pounds sterling yearley sallarey which use confirmed to
 her by a letter vested in your hands you complain of
 my not filfilling the terms of that letter by not paying
 your niece Jenney her anwal sallarey you know it was
 agreed upon although i believe it was omitted in said
 letter that her whole sallarey was to rest both principal
 and interest in mine and my brothers hands or in the
 hands of the surevivor of us dwering all the days of
 our lifetime as a fund and provision for Jeney i dare
 say upon a little reflection you will se the propriety
 thereof as all her wants are always to be supplied by me
 but in order to sattisfy all your dowbts and to show
 you that i am dessierows of dooing away yowrs and
 my past annimossitys i hereby become bound to pay
 Jeney the full proceeds of her three hundred pounds
 sterling annual wages principal and interest and that
 without any deduction whatever and that for each and
 everey year shee may or will conntinue with me the first
 term commencing upon the fourth day of March in the
 year of Our Lord One thousand seven hundred and Se-
 venty four years past the second terms payment upon
 the fourth day of March in the year one thousand seven
 hundred and Seventy five years past and so on annual-
 ley legal interest allways commenceing and accummu-
 lateing upon the preceding years sallarey at the Com-

' mencement of the succeeding years service and so on 1810.
 ' yearley and progressiveley thereafter and that for each
 ' and everey year Jenney Buchanan my late husbands
 ' natural daughter shall continue with me and the said
 ' Annwal Sallarey of three hundred pounds sterling with
 ' its legal accummulated Interest is allways to be resteing
 ' oweing and accummulateing to Jenney in my hands
 ' dureing all the days of my lifetime as a fund and pro-
 ' vission for her and at my deceasse the whole progressive
 ' accummulated proceeds of said three hundred pounds
 ' sterling annwal sallarey with its accumulateing interest
 ' to be paid her or her heirs without aney deduction and
 ' that unnder the penalty of twenty thousand pownds
 ' sterling you propose dooing for yourself and introduce-
 ' ing her into the world and her friends in town you well
 ' know, that you cannot wish her better or esteem her
 ' more than i have jwst reason to doo her being the in-
 ' strument in the hand of providence of preserveing my
 ' life when I had the misfortune of dislocating both my
 ' leg and arm and from her constant care and attention
 ' to my health and interest at All times since her father
 ' my late husbands death i concidder myself in duty
 ' bound to constitute her by this my unalterable and irre-
 ' vocable letter my sole heiress in the event of her out-
 ' liveing me and to succeed me to all my property both
 ' herritable and moveable with all my bills bonds and
 ' resteing money to whatever amount i may die possessed
 ' of and to filfill my promise to her father the late de-
 ' ceased Dougal Buchanan of Craigievearn husband your
 ' brother all this i doo of my own free will and accord for
 ' the love and esteem i have and carry towards the above
 ' named Jenney Buchanan my late husbands natural

1810. { daughter in gratitude and in return for her past services
 { to me and my late brother and i transmit this letter to
 { you by Mr Mculloch to be kept and used in all time
 { coming as a trew firm and stable vallid deed and evi-
 { dence notwithstanding aney write deed bequest paction
 { or form of law to the contrary and allways obliding
 { myself my heirs executors administrators or assignees
 { whomsoever to grant if need be or required and that at
 { aney future perriod aney bill bond or stamp reqwiesite to
 { full ratification and confirmation hereof all this and the
 { preceeding page is wrote by myself, this Seventeenth
 { day of May at Glasgow and subscribed by me in pre-
 { sence of those winesses Joseph Crombie Writer in Glas-
 { gow and Robert Anderson his Clerk. Consenting to the
 { Stamping and Registration hereof if ned be in the
 { books of Council and Session or others competent there-
 { to in witness whereof i am Madam your most

Obedient humble servant

(Signed) MARGARET BUCHANAN.

{ Joseph Crombie Witness

{ Robert Anderson Witness

{ Addressed on the back

{ Miss Jeney Buchanan

{ per Mr M'Culloch

{ Edinburgh.

When this letter was produced, it was challenged by Mr Snodgrass, as *a false and fabricated document*; and upon its being adhered to by Mr and Mrs Macnab, Mr Snodgrass followed up this challenge by a regular action

of reduction-improbation, concluding that it ought to be reduced as a *forgery*. 2dly, Supposing it to be genuine, alleging that it was obtained by fraud and imposition; and, 3dly, That not having been delivered to Mrs Macnab, it must be held as revoked by the subsequent settlements. 1810.

On the other hand, Mrs Macnab raised an action of reduction of these settlements, upon the ground, 1st, That Mrs Buchanan was not of a sound and disposing mind when she executed them; and, 2dly, That being granted posterior to an irrevocable deed, they were void and null.

All these actions came before Lord Glenlee, as Lord Ordinary. It was thought necessary, in the first place, to investigate the statements of the parties relative to the alleged *forgery*; and for this purpose the Lord Ordinary, before deciding upon any question of relevancy, appointed special condescendences of the facts, and afterwards allowed a proof, before answer; which having been taken at different periods, was reported, in the ordinary manner, to the Second Division of the Court. Before ordering any hearing upon the import of this proof, their Lordships directed a variety of chemical experiments to be made upon the writing in their own presence, with the view of examining the truth of a suggestion, that it had been written with delible ink. The whole evidence was then fully discussed by the counsel for the parties respectively, and the import of the proof will be found to be contained in the following summary of the chief circumstances, making for or against the deed.


1810. In support of the deed, the evidence adduced by the defenders was, in the *first* place, directed to show that it was a rational settlement, under the circumstances of the parties, and consistent with Mrs Buchanan's declared intentions. For this purpose they proved, by various witnesses, that she had always expressed an affectionate regard for the defender Mrs Macnab, as long as she remained in her house ; that she educated her as a gentleman's daughter, treated her with indulgence, and acted in every respect as a mother to her. With regard to the accident which befel Mrs Buchanan, and of which the deed itself makes mention, as well as of Mrs Macnab's attentions to her upon that occasion, it was proved by the evidence of the surgeon who attended her, and of other witnesses, that in the year 1780, she had fallen over a sunk fence in the garden, by which she had dislocated her wrist, and violently sprained her ankle ; and that during the confinement occasioned by this accident, as well as on subsequent occasions, she dwelt much upon Mrs Macnab's attentions to her, and declared that if she continued to conduct herself with the same propriety and affection, she would make her independent, or provide for her, or leave her the heir of all she possessed. On the other hand, it was much relied upon as a circumstance almost conclusive against the hypothesis of a forgery, that the deed bore to be holograph of Mrs Buchanan ; because, as was observed, the author of a fabrication would never commit so gross a blunder as to counterfeit a long letter, when his purpose might have been fully as well answered by forging the simple subscriptions of the granter and witnesses. But besides the inference arising from this fact, the deed had all the evidence which the law requir-

ed, to give it authenticity, since it bore to be regularly 1810.
 tested by Joseph Crombie, writer in Glasgow, and Robert Anderson, his clerk. Mr Crombie was proved to have been Mrs Buchanan's ordinary agent, and though he might not be consulted in the framing of the deed, or informed of its contents, he was precisely the person who would be called in to assist at the execution of it. In consequence of this gentleman's death soon after the date of the deed, it was not possible now to obtain the benefit of his testimony; but it was proved by a great variety of witnesses, well acquainted with his handwriting, that his name set down as witness to the deed was a genuine subscription. On the other hand, Mr Robert Anderson, his clerk, the other instrumentary witness, positively acknowledged his subscription, declaring that he firmly believed it to be his own handwriting; and though he could give no account of the deed, or of the occasion when he was called upon to attest the execution of it, yet it was considered as a circumstance by no means extraordinary, that a person who, like Mr Anderson, had been for many years in the daily habit of attesting the execution of deeds of all sorts, and in every variety of circumstances, should have paid no attention at the time to an incident so very familiar to him, or should have lost all recollection of it since. In the mean time, there being one dead witness, whose subscription was proved to be genuine, and a living witness who acknowledged his, the result, in point of law, was stated upon the authority of Lord Stair, (B. 4. tit. 20. § 23.) to be, that both subscriptions must be probative; and, consequently, that the deed must be held as the genuine and authentic act of the granter.

1810. In support of this conclusion, other circumstances were proved, tending directly to confirm the deed, or affording presumptions, more or less strong, to the same effect. Besides the evidence arising *ex comparatione litterarum*, which was maintained to be clearly in its favour, several witnesses acquainted with Mrs Buchanan's handwriting were examined, who stated, that the subscription at the deed was exceedingly like it; that on comparing it with subscriptions confessedly genuine, they were of opinion that the handwriting of both was the same; and that the subscription was unquestionably the work of the same hand which had executed the body of the writing. It was proved that Mr Crombie, some months before his death, had mentioned to a Mr Gilfillan, merchant in Glasgow, that Mrs Buchanan had executed a settlement in favour of Mrs Macnab, to which he had subscribed as a witness; and that Mr Gilfillan communicated this information, at the time, to his wife, they being both friends of Mrs Macnab. It was proved, that Miss Buchanan of Craigievearn, to whom the deed or letter is addressed, had shewed to the late Mrs Cauvin, a paragraph of a letter from Mrs Buchanan to her, in which it was mentioned, that Mrs Macnab had been very attentive to the old lady, and that she meant to make Mrs Macnab her heir. The date of this communication was not accurately fixed, but the fact itself was proved by Mrs Cauvin. It was not established by any evidence, that the deed, or letter in question, had ever been in the possession of Miss Buchanan, to whom it is addressed; neither was there any proof to shew what had become of it upon this lady's death, nor how it had come into the possession of Mrs Macnab. But upon these points it was al-

aged by her, that it was truly transmitted to this lady, ^{1810.} as it bears to have been by a Mr M'Culloch ;—that it remained with her till her death ; but that it had either been previously delivered by her to the late Lord Dreghorn, who was one of her trustees, or found by his Lordship in her repositories after her death ; and, at any rate, that it was delivered by Lord Dreghorn to Mrs Macnab. It was not to be supposed that this lady, while Mrs Buchanan lived, would be guilty of so great an indiscretion ; as to speak openly of such a deed ; or of the ample expectations which she had under it ; but, on the other hand, a total silence upon this subject would have been unnatural and improbable ; and it was accordingly proved, by various witnesses, that previous to Mrs Buchanan's death, Mrs Macnab had told some of her friends of the existence of a deed by which she expected to inherit the old lady's whole fortune ; or generally, that, under it, she had the prospect of a great succession ; and, she had farther mentioned, that the deed had been delivered to Lord Dreghorn, who had kept it for some time, and afterwards delivered it to herself.

On the other hand, there was no direct proof tending to show that the deed was forged ; but the pursuer, Mr Snodgrass Buchanan, rested his allegation upon the presumptive evidence, arising from a train of concurring circumstances. It was proved, that for the greater part of her life, and especially during the latter part of it, Mrs Buchanan was noted for extreme penury ; that she was of a temper proud, jealous, and tenacious ; that she was tinctured with strong prejudices, and in particular had an aversion to natural children, and highly disapproved of

1810. any settlements in their favour; considering them as  taken out of their proper sphere, when put upon a footing with lawful children. In the expression of this opinion, she was frequent and vehement; and when informed of Miss Buchanan's settlement, in favour of Mrs Macnab, she inveighed much against it, and severely censured her sister-in-law for introducing Mrs Macnab's name into her will, observing, that whatever she intended her to get, should have been bequeathed by a separate paper. She had, moreover, a rooted dislike to irrevocable settlements, and a contempt for the judgment of those who executed them; often saying, that she should never put her name to any disposition of her property, which a single touch of her pen could not undo. In spite of all these disadvantages it appears, that, for some time, the conduct of Mrs Macnab had been such as to conciliate the favour of this lady in a high degree; since it was proved, that upon the occasion of lending L.500 to a mercantile company in Glasgow, she took the bond payable to herself in liferent, and to Mrs Macnab in fee, with a reserved power to herself, however, to call up the money and discharge the bond. But, in the year 1789, the conduct of Mrs Macnab, in one or two instances, was such as to give her deep offence; and, in the end, a separation of the parties took place, under circumstances of the highest displeasure and resentment on her part. Mrs Macnab went to reside with Miss Buchanan; and, after her departure, Mrs Buchanan missed a bill of L.100, and certain articles of dress, which Mrs Macnab had taken with her, as she says, under the impression, that they had been presented to her by Mrs Buchanan upon a former occasion. Upon this incident it was proved, that Mrs Bu-

chanan, whether justly or unjustly, put the worst possible construction ; and from henceforth conceived a decided antipathy against her former favourite. Under the impulse of this feeling, she cancelled the bond for L.500, to which she had previously given her an eventual right ; she never afterwards mentioned her name without expressions of strong dislike and resentment ; she returned no answer to a conciliatory letter written by Mrs Macnab upon her aunt's death ; she even refused to see her ; and, upon one occasion, when this lady had got access to her, she turned her rudely from the house, and would hold no conversation with her. 1810.

The real evidence, arising from these facts, was further strengthened by the circumstances connected with the deed itself. Among other peculiarities that distinguished Mrs Buchanan, was an extreme difficulty of writing, which rendered her habitually averse to any lengthened exertion of this nature. She has frequently been heard to say, that she never wrote a letter in her life ; and it was proved, that scarcely, upon any occasion, was she known to write more than the subscription of her name to papers and letters, when necessary. The assistance of her agent was called in upon all occasions where writing was required, even for the most ordinary cards or letters. Such specimens of her handwriting as were produced, appeared to have a very stiff, irregular, constrained appearance ; whereas the writing of the deed is free, straight, and apparently executed with readiness. It was proved by several witnesses, that the deed and these specimens were not, in their opinion, the work of the same hand. The whole evidence, indeed, *comparative*

1810. *literarum*, was maintained to be decidedly hostile to its authenticity ; and the affectation of bad spelling was also remarked as unnatural and inconsistent with itself ; because words of familiar occurrence are blundered, while others that lie out of the track of common use, are spelt correctly. In like manner, it was proved by a variety of witnesses, that the deed is written with delible ink, which may be effaced with a sponge and a little water, and the utility of which, in the hands of a forger, is sufficiently obvious.

Finally, it was proved, that for ten years before Mrs Buchanan's death, she had always, upon occasion of lending out her money, taken the bonds payable to herself in liferent, and Mr Snodgrass Buchanan in fee. Several witnesses had repeatedly heard her say, that this gentleman was to be her heir, and express her favourable intentions towards him in different ways ; and it was proved, that when she did resolve to execute regular settlements in his favour, she sent for her agent, gave him express instructions on the subject, and afterwards put her name to these settlements, in perfect understanding of their import, in possession of her faculties, and without making the remotest allusion to any deed or settlement in favour of Mrs Macnab.


After hearing counsel fully upon these and other topics involved in the proof, the Court proceeded to advise the case ; and, being unanimous in their opinion, the LORD JUSTICE CLERK (HOPE), by appointment of their Lordships, delivered their judgment in the following terms :




MY LORDS,

1810.

In this case, which is of a very important, and of a very extraordinary nature, I have reason to know that your Lordships are unanimous in your opinion; and although it had not been so arranged before the meeting of the Court, yet I understand it may be more agreeable to your Lordships, that one of your number should deliver a distinct opinion, leaving it to any of the other Judges to notice afterwards such particulars as may strike them in a different point of view. Under these circumstances, although I had not exactly prepared myself to go through this case, expecting, on the contrary, rather to speak last, and to have the benefit of your Lordships' views, I shall endeavour to state, for the satisfaction of the parties, those circumstances which strike me as decisive of the case, in which I coincide with all your Lordships, as I have learned from various conversations. In the first place, in reference to what was very forcibly stated by the counsel for Mrs Macnab, I hope it will be generally understood by the parties, and by the country, that in determining whether a deed be valid or not, this Court will never go upon a mere balance of probabilities. On the contrary, in coming to the conclusion, in which the Court is unanimous, that this deed is false and forged, they do not satisfy themselves by balancing between probabilities, but between improbabilities, impossibilities, absurdities, and contradictions. I think it also necessary to state, that in forming that conclusion in this Court, and for civil purposes, it is not precisely necessary for us to say who was the forger of the deed. The only question on which we are to decide is, simply, Is that deed a genuine or a forged deed? But the question, What individual actually

1810. forged the deed, or which of the parties have uttered it,  knowing it to be forged? we are not bound to determine.

It is impossible to form, or to deliver, an opinion upon this deed, without attending minutely to the nature of it, the narrative and the circumstances under which it is said to have been granted. The testatrix, if I may use the term, was an old lady, Mrs Buchanan of Craigievearn; not indeed a very old lady at the supposed date of the deed; not above sixty I suppose, but of very peculiar habits; very peculiar disposition and modes of thinking;—she was married to Mr Buchanan, who appears to have had a natural daughter, born prior to the marriage; which natural daughter this lady treated with a degree of liberality more than was to be expected. She seems to have conceived an affection for her, and to have behaved to her with great kindness. Her husband and she lived together for ten or twelve years, when he died, leaving this daughter wholly unprovided for, or at least in a mere trifle, trusting probably to the affection which his wife had already conceived for her; and this affection is said to have continued for a considerable time. At last the old lady is said to have met with an accident, which occasioned a short confinement, and the girl appears to have attended her with that kindness and gratitude which became her. Upon this occasion, there takes place the first provision in her favour that we can see, or lay our hands upon,—a bond of provision for L.500. Soon after, however, she quarrels with the girl, in consequence of what she conceives to be some levity in her behaviour; and she is turned out of her family. It is said, that her

departure was attended with circumstances tending to in- 1810.
crease the old lady's resentment, and to prevent any re-
conciliation betwixt them. 

Under these circumstances, the girl takes shelter in the family of her father's sister; a lady not living in a good understanding with old Mrs Buchanan, whom she had left. There she is received, and lives with her till her death.

Immediately upon the quarrel taking place, old Mrs Buchanan, whose passions of all kinds were very strong, and under little controul, cancels the bond of provision, which she had granted as a reward for the girl's affectionate attendance upon her; and from this period, as far as was known, down to the day of her death, she never altered her intentions with regard to her,—never was reconciled to her, and never made any subsequent provision in her favour. But, upon the death of the old lady, who, in the latter stage of her life, executed a universal settlement in favour of the pursuer Mr Snodgrass, a relation of her own, there appears produced by Mrs Macnab, a deed in the shape of a letter, written by old Mrs Buchanan to her sister-in-law, of a very extraordinary nature and import. It begins as if in answer to some correspondence that had been going on between her and Miss Buchanan, of which the counterpart has never been produced; and the fact of correspondence is at any rate exceedingly improbable, inasmuch as it does not appear that they were upon any sort of friendly footing. It goes on to state, that she is surprised to understand that Miss Buchanan should wish her niece Jenny to leave her, after agreeing that she should remain, upon a yearly annuity or salary of L.300,

1810. which had never been before heard of, and for which no bond appears. But, you ought to recollect, she says that the annuity was not to be paid, but was to accumulate in my hands as a capital for Jenny's behoof; and then, to prevent all doubt, it goes on to reoblige her to pay a perpetual annuity of L. 300 to Miss Jenny Buchanan as long as she should continue with her, to be accumulated in her own hands during her life, and paid to Miss Jenny, with accumulated interest, after her death. And having done this, which of itself would have gone far to exhaust her fortune, it ends with an irrevocable settlement of all her goods and estate upon Miss Jenny, as her universal heiress, concluding as a letter, and, though bearing to be holograph, yet regularly tested by two gentlemen as witnesses; one of them Joseph Crombie, Mrs Buchanan's agent, and the other Robert Anderson, his clerk. This letter bears to have been sent to Edinburgh to Miss Buchanan, by a particular gentleman. It remains in her custody from the year 1786, when written, down to the period of her death, when her repositories were opened, and a settlement was found by her, in favour of Miss Jenny Buchanan, as her general or residuary legatee, with the burden of some legacies. But this most material deed—this deed in favour of the young lady whom she had intended to be her own heiress, fully as important as the deed which she herself had executed in her favour—is not found carefully put up in any of her drawers or repositories, but, it seems, was just lying at random among her loose papers. It is said, that having been found by Lord Dreghorn, it was by him delivered to Mrs Macnab, in whose custody it has remained, until produced upon the death of Mrs Buchanan. It has been challenged, in

a regular process of reduction, as false and forged ; and 1810.
after considering the case in memorials, ordering various investigations, and hearing counsel, your Lordships have come now to deliver your opinions, and to be all unanimous in thinking that it is false and forged.


Your Lordships are all aware, that, in the very peculiar circumstances under which this deed appears, it is no light or trivial consideration, no balance of probability merely, that can justify you in cutting down a deed regularly tested and witnessed ; and certainly there it is that the doubt only can lie. Most unquestionably there is very strong evidence with regard to the authenticity of the subscriptions of these gentlemen. Crombie is dead ; there are some witnesses who speak doubtfully as to his signature ; but, on the other hand, a number of persons do swear, that the subscription of Joseph Crombie, witness, is his genuine subscription. With regard to the other witness, Robert Anderson, he is himself alive ; his testimony has been obtained ; and it is very positive, no doubt, as far as it goes ; but it is not necessarily conclusive. He says, that he has no doubt whatever that it is his subscription ; but then adds, that he has no recollection of having subscribed the deed. The import of his testimony is little more, than that of one man to the handwriting of another ; for, if I have no precise recollection of subscribing, my belief that the subscription is mine, is no stronger than my belief in the subscription of any other person whose handwriting I know. I know the subscription of my brother Mr Erskine, and I think I could distinguish it as well as my own. Suppose two deeds were signed, one by Mr Erskine, and another by me ; if I

1610. remember nothing about the subscription, I would just believe as firmly in the authenticity of the one as of the other; and, without any precise recollection of having seen him subscribe, I would swear to his subscription as positively as to my own.

If, to be sure, Robert Anderson had stated, ‘that is not only my subscription, but I remember of the old lady signing the deed;’ or if he had gone farther, and said, ‘I remember of Joseph Crombie being exceedingly ill at the time; that he was obliged to be carried, wrapt up in flannel, to old Mrs Buchanan’s house, or that she came to his bed-room and subscribed the deed; that we were both of us struck with the strange appearance of this writing, and wondered that she should not employ her own man of business to write it, but only call him as a witness; or, at least, that, like many people who are anxious to conceal their settlements, she did not get a form of a settlement from him, and copy it herself;’—in short, if Anderson had more specially remembered the deed, the case would have been very different; and, most suspicious and unaccountable as it would still have been, I doubt much if we could have set it aside. But, in the first place, look at what this deed is. It is a deed by this lady, the most miserably penurious old woman that I think I ever heard of, and an irrevocable settlement, and gratuitous,—a settlement of a nature that, during all my practice at the Bar, I never saw nor met with any thing to parallel, and such as has never yet come under the consideration of the Court—a gratuitous, irrevocable settlement. The only one I can recollect of a similar nature, was a settlement executed by Sir Andrew Agnew; but that was made under very


different circumstances. It was executed for the professed 1810. object of disappointing a claim of legitim on the part of some of his children with whom he had quarrelled ; and it was in the shape of a formal deed, prepared by a man of business, regularly tested and delivered to the disponent in presence of witnesses. He had a motive for making such a settlement. But what motive had this lady ? Let us suppose that she felt every affection for this girl, as well as gratitude for her kindness : What reason was this for making the settlement irrevocable ? or, was there any greater reason for making the settlement irrevocable, than for making the bond for L. 500 irrevocable ? This is therefore a deed of a most extraordinary nature, totally adverse to the habits of the woman, and to the general conduct and feelings of mankind, and as to which nothing but the most convincing testimony that a person had actually executed it, can satisfy any one that it is genuine.

In the next place, the deed is extraordinary in another respect ; and that is, that it proceeds on the narrative of another deed still more unaccountable, which does not appear ;—a deed referring to an irrevocable annuity of L. 900 per annum, which was to be accumulated for this young lady ; and this irrevocable annuity it is the professed object of the deed to confirm. To whom was this deed delivered ? By whom was it executed ? What has become of it ? Let us consider what took place about this period. Soon after the supposed date of the deed, this lady had a mortal quarrel with the girl,—a quarrel which obliterated all trace of affection, cancelled all the obligations of gratitude, and raised up in her mind the most malignant revenge against her ; insomuch that, in-

1810. stantly to gratify that revenge, she discharged the bond of L.500, which she had granted as a reward for her former attentions, and which it was surely very unnecessary to grant, since, at the very moment, the girl held an irrevocable disposition to her whole estate;—which it was therefore foolish and ridiculous to grant, and which it was just as foolish and ridiculous to destroy. For, to what purpose destroy a bond of L.500 in favour of a person already vested with an irrevocable disposition to her whole fortune? But, independent of that, if it were possible to get over it, is it in human nature to believe, that this woman, so wedded to her wealth, so blinded by her passions, could possibly have forgot that she had executed an irrevocable settlement in favour of this ungrateful girl, as she was then supposed to be? Or, on the other hand, if she did not forget it, that the thoughts of what she had done, and of what she had now put it utterly beyond her power to undo, would not have driven her to absolute madness? If I know any thing of human nature, or can imagine the workings of another's mind, I am fully persuaded, that a woman of her penurious temper, finding that she had thus excluded herself from all power over her fortune, must have been driven to desperation; and that, in the paroxysms of her rage, there is not an agent in Glasgow, nor a counsel in this house, who would not have been consulted as to the validity of the deed; instead of which, from the hour when it is said to have been executed, to the day of her death, it never once entered her head. She must have forgot it when she granted the bond for L.500; she must have forgot it when she destroyed the bond; she must have forgot it when she granted the subsequent settlement; and, in

short, the whole tenor of her life proves, that this most solemn deed, by which she rendered this girl her irrevocable heiress, had completely vanished from her memory. The recollection of it never once flashed across her mind. These are strange, most strange circumstances, which it will require very strong evidence of the authenticity of the deed to make your Lordships believe. 1810.

But let us attend to the circumstances under which it was executed. And here it was ingeniously observed by Mr Erskine, that it is impossible to suppose it a forgery ; since a person intending to forge a deed would make the task as easy for himself as possible ; but to forge a long holograph writing, and thus multiply the chances of detection without any reason, is a supposition altogether incredible. It would have been much easier to have got it framed by some obscure man of business, and then there would have been nothing to do but to forge the subscription. Certainly it was easier in some respects, but not in others. It would have subjected the forgers to many unpleasant questions that do not occur at present. In the first place, if the lady had gone to a man of business at all, there was no reason why she should not go to her ordinary agent Mr Crombie. Many people, indeed, wishing to keep their settlements to themselves, employ no agent, or, at least, farther than to furnish a form ; but, if they are to employ an agent, they would certainly employ their own. Besides, if the deed had been done by an agent, it must have been paid for. There must have been a regular entry in his books, which would have ascertained the date ; and again, it must have been written on stamped paper ; and it would not have been so easy,

1810.  at that distance of time, to find a stamp corresponding to what were in use at the supposed date of the deed. Indeed, I doubt much if the water-mark upon the paper would not have betrayed them. Undoubtedly, the forgery of a holograph deed is more difficult; but it is only in the execution; while it has the advantage of preventing all such questions as, Who is the writer? Where is the entry in his books? What is the stamp? and a variety of others of the same kind: And therefore, although it is no doubt difficult, yet it is artfully contrived; because, in a holograph deed, no witnesses being necessary, there can be no demur about their subscriptions. There are witnesses here, indeed,—only for the purpose, however, of evading any objection that might be urged upon the head of deathbed. That was the only difficulty to be got the better of. Then it is executed under other very peculiar circumstances. It is one very extraordinary thing, that a deed challenged as forged should, by a concatenation of circumstances, happen to be written with very suspicious ink, which is evidently more or less of a delible nature. It is plainly not common ink, by which I mean ink in its ordinary state; and this is certainly a strange occurrence with reference to a deed otherwise very suspicious. The theory that has been given upon this point is, that it was written with this ink, in order to facilitate the forgery; since, if a word happened not to please, it might be obliterated, and written over again. Whether that be a just account of the matter or not, I know not; but I am rather of opinion that it was used for a different purpose—to give an air of antiquity to this writing. It was necessary to give it a very ancient date, because the quarrel was of two or three years standing; for which

reason, it was indispensable that it should not be written with ink that would have betrayed symptoms of recent manufacture. This, I suspect, is the real meaning of the delible nature of the ink; for I doubt much whether it would have been possible to write upon such parts of the paper as had been previously wetted. But, be that as it may, it certainly is a most suspicious circumstance, that a deed challenged to be forged should be written with a species of ink that aids the suspicion. 1810.

It is, besides, executed in presence of two witnesses, one of whom was the lady's ordinary agent, who was proved to have been almost on his deathbed at the time, not out of the house for several months preceding, and not till the King's birth-day subsequent to the execution of the deed. One of two things, therefore, must have happened, calculated to make a strong impression on the minds of the witnesses, viz. that, in order to witness this deed, she must either have gone to his bedside, and there have subscribed it; or that he must have been carried, wrapt up in flannel, to her parlour. Now, setting Crombie aside, is it credible that Anderson should have had no recollection, or, rather, is it not clear that he must have recollected a deed executed under circumstances like these, which must have made an indelible impression upon his mind? And farther, is it credible that Crombie and Anderson, who were not strangers to each other (for they were master and clerk), should not have said to each other, in their way home from witnessing this deed, What has this lady been doing? What extraordinary matter is this? If she had read over the deed to them, it must have struck them as uncommon; and is it possible that her confidential agent would have made no re-

1810. marks—that his clerk would have made no remarks—that his clerk should have no memory of the transaction, and should have felt no surprise in his mind that he had been called upon, by his master, to witness the execution of a deed so strangely drawn up, not by his master, but by the old lady herself? It is hardly possible to imagine it. I cannot conceive, that these two people should have gone away from the execution of so strange a deed, which they must have seen was in the form of a letter, without being struck with it, and communicating their sentiments to each other. This is, in the minds of your Lordships, a most unaccountable circumstance.

So much as to the execution of the deed. Let us see what becomes of it afterwards. It is sent by a particular gentleman to Miss Buchanan,—a lady with whom the testatrix had also had a quarrel—with whom she was not in correspondence, and between whom there was, to be sure, a transaction as to the mansion-house, carried on, not by correspondence between the parties, but in the dry, formal manner of intercourse between their men of business. The letter is addressed to Miss Buchanan. Soon after, the quarrel takes place, and Miss Jenny becomes the inmate and favourite of this lady, who then conceives the resolution of making her her heiress, and actually executes a trust-deed in her favour. Now, is it possible that this Miss Buchanan, intending to make Miss Jenny the heiress of her fortune to the extent of two or three thousand pounds, should have carefully laid up that deed, but that the other deed, so much more important to the interest of her favourite, should never find its way into her repositories, but should take its chance, by being tossed about, found or not found,

among all the idle and gossiping letters that might be lying about her ; and where it actually was lost, and where it might still have remained, but for the singular accident, that no less a personage, in point of accomplishments, learning, and accuracy in business, than the late Lord Dreghorn, in rummaging through her other papers, chanced to find this letter. That is the story that is told, because it was necessary to state how it was discovered. Now, I ask any one that knew Lord Dreghorn, who, if he was distinguished for any one thing more than another, was remarkable for a degree of punctilious accuracy and precision in every thing that he said or did, whether it is possible to believe, that his Lordship, finding a letter of this most extraordinary description, would not have immediately taken some step upon the occasion ? It is impossible to believe that he would not have instantly docketed upon the back of it, ‘ This writing was this day found by me among some loose papers of Miss Buchanan of Craigievarn.’ Nay, more, as he was left one of that lady’s trustees for behoof of Miss Jenny Buchanan, I am persuaded that he would have immediately sent for some of his co-trustees, and said—‘ Now, it is true you are not witnesses to my finding this deed ; but I take you all to witness, that here it is *valcat quantum*. There it is—put your initials to it along with me, certifying the date at which I shew it you.’ I am fully persuaded that, if he had found the deed, he would have taken some such steps ; or, if he did not do it in so formal a way, that he would have delivered it to the lady before witnesses, or sent it in some letter of his own ; instead of which, as if it had been a mere trifling or common-place sort of thing, to which no suspicion attached, he is said to have carelessly

1810. handed it over to Miss Buchanan—‘ There is a deed which I found to-day ; if it is of any consequence to you, you may keep it.’ This is indeed most unaccountable, that any man who called himself a man of business, and particularly a man so scrupulously accurate, should have omitted some such step as that. Suppose he had found, by accident, another deed of this lady, Miss Buchanan, to which there attached no suspicion, is it possible to believe, that he would not have sent for the other trustees, and notified it to them ? And yet here is a deed, in which his constituent was ten times more interested, of which he takes no notice, more than if it were a piece of waste paper.

The deed, however, is said to have been delivered to Mrs Macnab,—a piece of paper by which she was to derive right to the whole succession of this lady, from whom she had nothing now either to hope or to fear. They had quarrelled past all chance of reconciliation ; and whether they were to be reconciled or not was not a matter of the least consequence ; since the old lady could neither make her better nor worse. What reason was there, then, that Mrs Macnab should trust her whole prospects in life to the chance of this deed being lost ? She had got a pretty broad hint upon the subject by its being nearly lost already ; and was there no chance that it might be lost or destroyed in removing from house to house, or by fire or other accidents ? As to its being renewed, that was out of the question. Why, therefore, not put it upon some record for preservation ? I ask, what prevented it ? There was no risk of giving offence to her with whom she had quarrelled : there was no danger that she should be cut out

of any other property, having already got every thing. 1810. It was little short of madness to keep this deed lying by her, subject to all those accidents to which we know papers are at all times liable; subject to the accident which had befallen the irrevocable bond for L. 300, which has somehow disappeared; and how she could expect that this deed was to escape the same fate, is to me utterly unaccountable.

I have adverted only to what I think the material circumstances attending this deed, independent altogether of what appear on the face of the writing; and there are some very extraordinary circumstances appearing upon the face of it. First, it is written with a degree of regularity, in point of distance of lines and straightness, of which this old lady on any other occasion was utterly incapable. Her jottings and memorandums are written in every possible direction. Secondly, there is a mixture, and that a very strange mixture, of good spelling and bad; not that this is in itself very extraordinary, because no person who spells ill spells every word wrong. But, on looking at this deed, some of the most difficult words, which she was least likely to know, and probably never used before, are well spelled; while, on the other hand, she herself habitually spelled wrong the words that were most familiar to her mind. Two struck me particularly, which she wrote day after day, *interest* and *sterling*, the two words which occupied her thoughts and her hands more than any other. She never ceased to think of her *interest* and her *sterling* money. Now, in her own jottings, these two words are constantly and habitually spelled wrong, *intrist* and *sterlen*; and yet, strange to

1810. tell, these words which she habitually spelled wrong, but which she must have believed she was spelling right, occur four or five times in the deed, where they are uniformly spelled right, interest and sterling. Indeed there is a variety of other particulars of the same kind, when you come to examine the writing. The pronoun I is uniformly written with a small i, a thing very unusual. I will venture to say, there are people who may write a small i twenty or thirty times, but who, if ever they use a capital I, do it when they come to write the pronoun, and if ever a person use a capital I, it is always in that case ; and yet in this long letter she does not use the capital I, although in her jottings she was in the habit of using it, even when it was not necessary.

In short, without troubling your Lordships farther, these are the general ideas which have struck me, and I understand have also struck your Lordships. Some of them I may have expressed more and some less forcibly, which deficiencies you will of course supply. But these are the grounds on which the Court are unanimously of opinion, that this deed must be set aside, as false and forged ; and that being the case, I do not know whether the parties would incline to have the opinion of the Court upon its import ; for strange as it is, after all, holding this deed, as we do, to be a notorious forgery, there are great doubts whether it is effectual. As to heritage, there is no doubt that it is not. The law knows no form of constituting an heir in heritage. There must be dispositive words conveying the fee from one person to another, unless perhaps in a deed ; a trust deed for example, where a person conveys his estate in trust, for purposes to

be afterwards declared. But there is no instance, in 1810. which your Lordships have sustained such a deed as this, which only declares a certain person to be the heir.

With regard again to the moveables, the case may perhaps be different. As to the irrevocable annuity, perhaps the deed is sufficient; but as to the heritage, none of your Lordships have the least doubt that it is ineffectual. After all this risk then, all this trouble, a deed has been concocted ineffectual for half the purpose for which it was intended.

There is one other point to be noticed after the conclusion, which now entitles us to call this deed a most audacious forgery; namely, what steps the Court is to take, with regard to the parties who have dared to found upon it. That is indeed a very serious matter; and, but for the peculiar circumstances under which the parties using this deed stand, it would have been attended with very material consequences. But, as I stated before, for the purposes of civil justice, your Lordships are not bound to come to any conclusion, as to who were the forgers of this deed, or who have used it knowing it to be forged; and in this country, where justice is administered with tenderness and humanity, your Lordships are not entitled to punish crimes *per aversionem*. Even in the Criminal Court, you must see distinctly the precise person who is guilty before you inflict punishment. You will not lay hold of two or three persons, and say the guilt is among you. That is not the course of British justice. There are crimes, indeed, in which if a person is accessory at all, it is visible; for ex-

1810. ample, if three or more persons are concerned in a murder, you will not stop to enquire who gave the mortal stroke. All are equally guilty. In the same way, in the case of mobs, or riots, which are visible crimes ; if a house is burned by a mob, you will not stop to enquire who set the torch to the door. All are guilty. But the crime of forgery is a secret crime, which may be committed by one without the knowledge of another ; by one, when another is the innocent instrument of uttering and using it.

These parties who have come before us, stand in the relation of husband and wife. It is on the one hand a possible case, though not the most probable, that the husband may have forged it without her knowledge or participation, and, therefore, it would be improper to make the wife responsible. On the other hand, it is equally possible and more probable, that the wife has forged this deed, and imposed it upon her husband, which would render it improper to punish him ; and there is a third supposition, that the actual forgery has been committed by somebody else, with the participation of one or other of the parties ; and therefore, under all these circumstances, feeling, that if your Lordships were to stretch forth your hand, you might be punishing the innocent in place of the guilty ; and feeling, that the grievous disappointment in this case, must be of itself no slight punishment to persons who have formed such magnificent hopes, your Lordships are rather disposed to refrain from coming to any decision upon the point—which of all these parties is the actual forger or utterer of the deed. Among them it is ; and however uncertain your Lordships may be of

the subject, the guilt is well known to one or other, or to both of the parties, and to the stings of their own consciences, and of disappointed guilt, your Lordsips leave them; inflicting this only punishment, which follows not as such, but as a civil consequence of your judgment, the payment of the very heavy expences in this case. 1810.

LORD MEADOWBANK.

Not having heard the counsel at the last pleading of the case, I am perhaps not entitled to give my opinion. But I read the informations and the proof, and formed my opinion last summer session, when your Lordships thought it right to order some farther investigation into the delible nature of the ink. I concurred in the propriety of that investigation, and approved of giving the subject due consideration; and though I did not hear the counsel, I think it right to say, that I agree entirely with the opinion which your Lordship has delivered upon the leading and material points of the case. What bore invincibly on my mind, was this, that subsequent to the date of the deed, a difference occurred which must have recalled it *de recenti* to the granter's mind, who was a woman of very strong passions, and certainly not likely to forget a transaction of this nature, which, from her habits, must have cost her the trouble of transcribing the deed. It must have weighed upon her mind, as in fact it was quite unexampled in her history. And then, called upon as she was, to consider what was to be done by this deed, it is impossible that she could have forgot it. It appears to me impossible that she could have executed this deed; she must have had a copy before her; for it is

1810. plainly the production of a person not unacquainted with business, having some knowledge, but a very imperfect knowledge. The deed ought to be considered as a copy made by the lady. The orthography and the diction is particularly remarkable. If it had been the work of Crombie, it is not likely that it would have been so expressed; he must have known that it was impossible to contrive an irrevocable deed, *mortis causa*. There might have been an irrevocable annuity in it. But the style clearly shews that the framer of it was ignorant of what he was doing. There is no feeling that a court of law would never believe that Mrs Buchanan would grant an irrevocable settlement. These absurdities strike me forcibly; it is quite unusual that a lady always making a capital I, should begin making small ones. I never had a doubt that it was a palpable forgery.

LORD NEWTON expressed his entire concurrence with the opinion delivered by the Lord Justice Clerk, upon the same grounds.


The Court then pronounced an interlocutor, reducing, decerning, and declaring in terms of the pursuer's libel, and finding expences due. This judgment, of course, superseded the necessity of considering the other points, relating to the legal effect of the deed.

Counsel for the pursuers,—Clerk, Gillies, Jardine, &c.; Agent, William Patrick, W.S. For the defender,—Erskine, Jeffrey, Greenshields; Agent, John Mackenzie, writer in Edinburgh; Mr Ferrier, Clerk.

(FIRST DIVISION.)

THE CASE**OF****JOHN ROUTLEDGE, Esq.****OF THE EAST INDIA COMPANY'S SERVICE, AND HIS ATTORNIES;
AND JAMES ELLIOT, W. S. THEIR MANDATORY,****AGAINST****WILLIAM THOMAS CARRUTHERS, Esq.****OF DORMONT; AND GENERAL FRANCIS CARRUTHERS, HIS UNCLE
AND GUARDIAN,**

In the year 1731, Francis Carruthers of Dormont married Miss Margaret Maxwell, daughter of Sir Alexander Maxwell of Monreith. No contract of marriage was executed upon this occasion; but, in July 1735, after the parties had lived together for nearly five years, without having any children, they resolved to make a settlement of their affairs, in the form of a post-nuptial contract; and, accordingly a deed of this description was completed between Mr Carruthers on the one hand, and his wife, with consent of certain gentlemen as trustees for her brother, on the other. By this deed Mr Carruthers, in contemplation of the marriage already solemnized, and of the portion

1811. received with his wife, became bound to secure her in a  liferent annuity, upon his lands and estate, and to take the necessary measures for settling the estate itself upon the heirs of the marriage, according to a particular destination, as well as for certain contingent provisions to daughters.

After executing this contract, the parties continued to live together till the year 1740, having been married for ten years, without having any children, and apparently with little prospect of such an event. In the course of that year, Mrs Carruthers abandoned herself to habits of the most open adultery; and, among other instances of profligacy, gave herself up to a course of criminal conversation with one of her own servants. Her husband at this time was absent in England, where he had gone, as he alleged, in August 1740, and was detained for several months upon particular business, so that it was not until the month of November, when he reached his mother's house, on his way back to Dormont, that he was informed of his wife's infidelity. He immediately dismissed her from his house, and never again saw or acknowledged her. At the same time, he took measures to obtain the only remedy which the law affords in such cases; and, in the same month of November, he instituted a process of divorce before the Commissaries of Edinburgh, against Mrs Carruthers, upon the head of adultery.

The lady contested this process with great obstinacy. She had the assistance of the celebrated Mr Lockhart, afterwards Lord Covington, who was her relation, as well as of other counsel, and no exertion was spared to resist a

proof, and to save her from the decree of divorce which 1811. followed. But all her efforts were unavailing. The clear-
est evidence was adduced of a course of the most abandon-
ed criminality on her part, which it appeared had begun
in the month of August 1740, soon after her husband was
alleged to have gone to England, and had continued un-
til his return to Dormont, when she was dismissed his
house, after which he had never had the least communica-
tion with her.

It appears, however, that at this time she had been se-
veral months gone with child; for, upon the 28th of May
1741, during the dependence of the process of divorce, she
was delivered of a daughter, and upon this event she applied
to the Commissaries for an order upon her husband to de-
fray the charges of her inlying. This was opposed by Mr
Carruthers, upon the ground that she had not been deli-
vered of a child. But it being ascertained by the clearest
evidence, consisting of the depositions of the woman in
whose house she lodged, and of the physician and midwife
who had attended her during her confinement, that she
was delivered of a living female child, the Commissaries
awarded L. 20 to her, which was paid by Mr Carruthers,
under protestation that his doing so should in no respect
imply any acknowledgment of the child's legitimacy. This
protestation was admitted by Mrs Carruthers; and, in the
end, a final decree of divorce was pronounced, finding the
adultery clearly proved, and divorcing and separating the
parties in the ordinary form.

After this event, Mrs Carruthers seems to have taken
up her abode in obscure lodgings in Edinburgh, and was

1811. little or no more heard of. The child was baptized by the name of Elizabeth Carruthers, and although not acknowledged, but disowned by Mr Carruthers, and alleged to be the fruit of her mother's crime, was taken charge of and maintained by him. After being boarded for several years with one David Hozier in Leith, she was removed, by desire of Mr Carruthers, to the house of a woman in Craiglockhart, where she remained for a short time. It seems to have been his object to have her brought up in obscurity, and to conceal, as much as possible, the extraordinary circumstances attending her birth. For this purpose he employed one Walter Beattie, a tenant of his own, to look out for a proper place on the borders of England, where she might be lodged; and Beattie having accordingly made enquiry upon this subject, at last concluded a bargain with Thomas Robson, a farmer in Gunnerton, who agreed to receive and board her for L. 5. 10s. per annum. With Mr Carruthers' consent, she was accordingly removed from Craiglockhart to Gunnerton, one of the wildest spots in Cumberland, where she was placed with Robson, and was brought up in his family, passing occasionally, among the neighbouring peasants, by the name of *Betty Robson*. At this time she was not more than nine years of age, but even then she seems to have been informed of her real pretensions, for she stated herself to be the daughter of a gentleman of fortune in Scotland, and shewed resentment when addressed by the name of Robson, affirming that she was called Carruthers, and not Robson, and always writing in her school books Elizabeth Carruthers, as her proper name.

.. In this situation she remained until the year 1758, when

having gone from Robson's house, in company with his sister, to Hexham fair, she took that opportunity of eloping with a Mr Henry Routledge, who had a farm in the neighbourhood, and had for sometime paid his addresses to her. This gentleman carried her to Edinburgh, where they were regularly married in her mother's lodgings. 1811.

Mr Routledge was at this time in very straitened circumstances, and he soon after met with misfortunes which naturally attracted his attention to the claims competent to his wife, (supposing her to be legitimate) under the contract of marriage executed in 1735, between Mr and Mrs Carruthers. By that contract, Mr Carruthers was taken bound to settle his estate upon himself and his heirs male by Mrs Carruthers; whom failing, his heirs male by any subsequent marriage; whom failing, his heirs female by Mrs Carruthers, and their heirs male, the eldest daughter, and the heir male descending from her, always excluding the rest, and succeeding without division; whom all failing, to Mr Carruthers, his heirs and assignees whatsoever.

He was farther bound to provide and secure whatever lands or heritage he might acquire during the standing of the marriage, to himself and his spouse, and the longest liver of them two, in conjunct fee and liferent, for her life-rent use allenary, of the third part of such lands and heritages, in case there should be a child or children existing at the dissolution of the marriage, and a half thereof in case there should be none existing, and to the heirs of the marriage in fee.

But as it was possible, that upon the failure of heirs

1811. male of that marriage, the estate might go to the heirs male of Mr Carruthers in some subsequent marriage, so as to exclude the daughters (if any) of the first marriage; Mr Carruthers, therefore, became bound, in case of there being daughters so excluded, to pay them the following sums, in full of all legitim, or whatever else they could claim through the death of him and Mrs Carruthers, viz. if but one, the sum of 18,000 merks, and if two or more, 20,000 merks, to be divided among them as he should think fit; and in case of no such division by the father, to be divided equally, after setting apart 2000 merks as a *præcipuum* to the eldest; and that at the first term of Whitsunday after their majorities or marriages, whichever of them should first happen. The contract of marriage was not in the form of an entail, and contained no prohibitions.

. By virtue of these provisions, Mr Routledge was advised, that as matters then stood, his wife (supposing her legitimate) being the only heir of the marriage, had an eventual right to the estate of Dormont; and if this should be considered as still open to be defeated by the possibility of an heir male of a subsequent marriage, that she was at any rate entitled to the 18,000 merks, or L. 1000 sterling, provided to the daughters in that event. Even with regard to this right, however, the question how far it was then exigible, seemed to be not unattended with difficulty; since her exclusion from the heritable succession could not be considered as fixed or complete, until the actual existence of an heir male of another marriage. But, nevertheless, under all the circumstances, Mrs Routledge was advised to bring an action before the Court of Session, set-

ting forth the terms of the contract of marriage, subsum- 1811.
ing that she was the only child of the marriage, and con-
cluding against Mr Carruthers for implement of the whole
obligations and conditions incumbent upon him, and par-
ticularly for payment of the L. 1000 provided to her, and
made payable on the day of her marriage, with interest from
that date.

This action was resisted by Mr Carruthers; and his
defence seems to have chiefly resolved into a denial, either
that Mrs Routledge was the daughter who had been born
of Mrs Carruthers, or that, supposing she were admitted
to be so, she could be held as the legitimate offspring of
the marriage. Upon this issue the parties went to proof,
and after some progress had been made in the investiga-
tion, the matter was settled by a compromise, which was
carried into effect by means of the following deeds.

In the *first* place, on the 26th October 1759, a con-
tract was executed by Mrs Routledge, with consent of
James Ewart, accountant of the Royal Bank, to whom
the claims of Mrs Routledge, under the contract of mar-
riage, had been conveyed, partly in security, and partly in
trust, on the one hand, and Mr Carruthers on the other;
by which the former parties bound and obliged themselves,
that Mrs Routledge and her husband should accept of
L. 650, in full satisfaction of the whole provisions con-
tained in the contract of marriage, or any other claim
which they, or any person deriving right from them,
could pretend by virtue thereof. *2dly*, On the 30th Novem-
ber 1759, Mr Carruthers, on the one hand, and Mr and
Mrs Routledge, and Mr Ewart, on the other, executed a

1811. submission to Mr James Ferguson, afterwards Lord Pitfour, and to Mr Alexander Lockhart, afterwards Lord Covington, who had been counsel for the parties in the previous action, all questions whatsoever depending between them, and particularly all right or claim of succession, or other right or claim of whatever kind, competent to Mrs Routledge, or her husband, by virtue of the provisions in the contract of marriage, in favour of the children thereof. *Sdly*, In pursuance of this submission, the learned arbiters, on the 7th December following, gave forth their decree-arbitral, decerning and ordaining Mr Carruthers to make payment to Mrs Routledge, and her husband for his interest, and to Mr Ewart in their name, of L. 650, in full satisfaction to Mr and Mrs Routledge, of all right of succession, or other right, which they or any of them had or could have at any time or in any event, by virtue of the provisions of the marriage contract, and decerning and ordaining Mr and Mrs Routledge, and Mr Ewart for their several rights and interests, upon payment of the above sum, to execute a complete discharge in favour of Mr Carruthers, of all claims and demands, of whatsoever nature, which they could have against him for any cause preceding the date of the submission; and particularly all claims of succession, or otherwise, in virtue of the provision in the contract of marriage. *Lastly*, The money being paid to Mr and Mrs Routledge, and Mr Ewart, they, on the same day on which the decree-arbitral was signed, executed a discharge in pursuance thereof, renouncing and discharging, in the most ample terms, all right competent to them, or either of them, in virtue of the provisions, or any part thereof, contained in the contract of marriage.

Immediately after this arrangement was completed, 1811.
(8th December 1759) Mr Carruthers made a new settle-
ment of the estate, by which he disposed it to himself and
his heirs male; whom failing, to William Carruthers,
his brother, and his heirs male; whom failing, to his
own nearest heirs male whatsoever.

At the period of the submission and discharge, Mrs
Routledge was a minor. But she lived till the year 1768,
when she died at the age of twenty-seven. Her husband
only survived her a few years, but they left three chil-
dren, a son named John Routledge, who went to India
as a writer, and two daughters, the eldest of whom,
Anne, was married to the Right Reverend Dr Majendie;
Lord Bishop of Chester, and afterwards of Bangor.

Mr Carruthers died in the year 1773, and was succeed-
ed by his brother, William Carruthers, who executed an
entail, both of the estate of Dormont, and certain other
lands acquired by his brother, in favour of himself and
his eldest and second sons, *seriatim*, and their heirs male.


William Carruthers died in the year 1787, and was
succeeded by his eldest son, William Aikman Carruthers;
who was fifteen years in possession, but made up no
title.

William Aikman Carruthers died in the year 1802, and
was succeeded by his only son, William Thomas Carru-
thers, then an infant, who had never been served heir,
nor made up titles to any of his ancestors.

1811. In the mean time John Routledge, the only son of Mrs Routledge, returned from India, and being advised that he had right, under the contract 1735, to the estate of Dormont, proceeded to serve himself heir of provision in general, before the Magistrates of Canongate, to Francis Carruthers of Dormont, his grandfather, in terms of the marriage contract. In this character he then brought an action against William Thomas Carruthers, the infant, and his guardian, for setting aside the disposition of 8th December 1759, and whole subsequent conveyances, upon the following grounds. 1st, That they were in direct contradiction to the destination and obligations of the contract in favour of the heirs of the marriage. 2dly, That they were in contravention of an inhibition raised upon these obligations; and, *lastly*, That the pursuer's mother and grandmother having both predeceased his grandfather, who died without contracting any second marriage, the deeds in question were executed in defraud of his just rights as the heir, served and retoured under his grandfather's contract of marriage.

On the other hand, a counter-action was brought, at the instance of William Thomas Carruthers and his guardian, against Mr Routledge, for setting aside his service before the Magistrates of Canongate, as having been clandestinely and irregularly carried through, and upon other grounds.

Both actions came before Lord Balmuto, as Lord Ordinary. The leading process was the action against William Thomas Carruthers and his guardian; in their defence against which, the chief grounds of their counter-

action were necessarily involved. Setting aside certain 1811.
 dilatory pleas, this defence was, 1st, That the late Mrs 
 Routledge was not the daughter who had been born of
 Mrs Carruthers. 2^{dly}, That though she were, she could
 not be held as legitimate, but, on the contrary, was clearly
 illegitimate; and, lastly, That, at any rate, all rights com-
 petent to her, under the contract of marriage, were compro-
 mised and discharged by the transaction in 1759.

After some proceedings, the Lord Ordinary pronounced
 the following interlocutor: ‘ Having considered the mu-
 ‘ tual memorials for the parties, with the writs produced,
 ‘ and whole process, *in hoc statu*, Repels the objections
 ‘ stated by the defender, to the pursuer’s title to insist in
 ‘ the present action; but reserves to the defender, if he
 ‘ shall be so advised, to establish what he alleges respect-
 ‘ ing the illegitimacy and non-identity of the pursuer’s
 ‘ mother; but sustains the defences founded on the sub-
 ‘ mission entered into in 1759, betwixt Francis Carruthers
 ‘ of Dormont, and Mr and Mrs Routledge, the pursuer’s
 ‘ father and mother, decree-arbitral, and discharge, and
 ‘ renunciation following thereon, and which has not
 ‘ hitherto been sought to be reduced; therefore assoil-
 ‘ zies the defender, and decerns.’

Against this interlocutor both parties petitioned the Court;
 and their petitions having been followed with answers, a
 proof was allowed, of certain facts, applicable chiefly to the
 question of the identity and legitimacy of Mrs Routledge.
 This proof was taken and reported; and a variety of other
 proceedings then took place; in the course of which, an
 old contract of marriage was discovered, dated in the year

1811. 1708, entered into between John Carruthers, only son and apparent heir of John Carruthers of Dormont, and Mary Bell, eldest lawful daughter of William Bell of Winterhophead, with consent of the respective fathers of the parties.

By this contract, John Carruthers the father disposed in favour of his son and the heirs male of the marriage ; whom failing, the heirs male of his son by any other marriage ; whom failing, the heirs female of the marriage without division ; whom failing, the heirs female of his son by any other marriage without division ; whom all failing, his own heirs female without division,—the estate of Dormont and certain other lands. On the other hand, William Bell, the father of Mary Bell, disposed his lands to John Carruthers, younger, in life, and to the heirs male of the marriage in fee ; whom failing, to Mary Bell and her heirs whatsoever. This contract was conceived in the form of a strict entail, and was fenced with regular prohibitory, irritant, and resolute clauses, all in sufficient form to prevent selling, contracting debt, or altering the order of succession.

John Carruthers the father died in 1720, and John Carruthers the son in 1722, when he was succeeded by Francis Carruthers, whose history has been already stated.

This Francis Carruthers was served nearest and lawful heir of provision of the marriage between John Carruthers, his father, and Mary Bell, and also heir in general to John Carruthers, his great-grandfather, and in special to

his great-great-grandfather. In these several characters, 1811. he made up titles to the whole lands of Dormont and others, held by his ancestors; but in doing so, as well as in his marriage contract with Margaret Maxwell before detailed, he overlooked the tailzie in the contract 1708. For in place of making up titles upon that tailzie, as the basis of all his investitures, he made up his titles in fee simple; and by his contract with Margaret Maxwell, he varied, in a certain degree, the order of succession established by the tailzie, which was to the heirs male of the marriage between John Carruthers and Mary Bell.

The discovery of this old contract led to another plea, on the part of William Thomas Carruthers and his guardian, viz. That the alteration, by the contract 1735, under which Mr Routledge claimed, of the order of succession established by the prior tailzie 1708, was an unwarranted innovation, and an act of injustice to the heirs of that settlement, to which it was *ultra vires* of Mr Carruthers to give legal effect.

This contract having been produced in Court, and the proof duly reported, the whole cause was then before their Lordships, and seemed to resolve into three questions; 1st, The identity and legitimacy of Mrs Routledge. 2dly, The effect of the entail 1708, upon the subsequent destination in the contract 1735; and, 3dly, The effect of the compromise in 1759, contained in the contract, submission, decree-arbitral, and discharge.

The counsel for the parties were fully heard upon the whole matter in dispute; and the following summary

1811. of the argument will shew the leading topics on both sides.

Pleaded for the pursuer, Mr Routledge.

Upon the point of identity, the verdict of the jury, who served the pursuer heir to his grandfather, must be held as conclusive; but he has farther proved, by the clearest evidence, the actual identity of his mother with the child born by Mrs Carruthers in 1741; and with regard to the question of her *status*, or filiation, as she was confessedly born standing the marriage between her mother and Mr Carruthers, the maxim *pater est quem nuptiæ demonstrant*, leaves room for doubt that she was a legitimate child. As to the effect of the entail contained in the contract 1708, it was disregarded by Mr Carruthers, who made up titles in fee simple; and the estate having been possessed upon these titles till the present day, the entail, whatever it might have been, is out down by the negative prescription.

With regard to the compromise which took place in 1759, and the consequent discharge executed by the pursuer's mother, it can afford no bar to his action of reduction. It is denied, that there was in reality any submission to Messrs Ferguson and Lockhart, or that these gentlemen either were, or considered themselves to be, at liberty to take into view the true nature and value of what was attempted to be given up by Mrs Routledge, or to exercise their judgment in fixing its real worth. On the contrary, they were bound down by the previous contract, of which their decree-arbitral was merely a repetition; whereby Mr Carruthers, taking advantage of the destitute

condition of Mrs Routledge and her husband, prevailed 1811.
upon them to sacrifice their right to the estate of Dor-
mont for L.650. It is true, that to give an appearance of
plausibility to this most unjust and iniquitous transaction,
the submission was entered into; but it is evident, from
the whole *res gesta*, that the arbiters had no discretion,
and that they did nothing more than simply repeat the
agreement previously concluded by the parties.

But farther, Mrs Routledge could not effectually discharge the right of the heir of the marriage, because she never was vested with that character, nor had any proper *jus crediti*. The true heir of the marriage, or, in other words, the person entitled to demand implement of the contract, could only be the heir who should be alive when the succession opened by the father's death, as it was not till then that the rights of the heir became exigible. But by predeceasing her father, Mrs Routledge never attained to the *jus exigendi* of any provision under the contract. She died before the contingency had arrived which gave birth to the rights of the heir; and never, therefore, having been in *titulo* to demand, she had no right to discharge them. Besides, she had no proper *jus crediti*, such as belongs to the eldest son of a marriage where the estate is devised by the contract to heirs male. She had merely a *spes successionis*, which might have been defeated at any time by an heir male of her father in a subsequent marriage; and, on the other hand, she had no present right, even to the provision in favour of the daughters in that event, because they could not be held as excluded from the heritable succession, and, of course, entitled to the provision as long as it was possible that their father

1811. might have heirs male in a future marriage. Not having any certain right, therefore, either to the estate or the provision, but merely the chance of one or other, she could discharge nothing beyond this defeasible expectancy; and consequently, independent of the discharge granted in 1759, the right of the heir of the marriage remained entire when the succession opened by Mr Carruthers's death. But the pursuer himself, the heir of provision in general to his grandfather, is the only person who ever was truly heir of the marriage.


Where the eldest son dies before his father, his debts and deeds cannot affect the subjects devised to the heir of the marriage; that is, to him who succeeds upon the father's death, whether he be a second son succeeding the eldest son, or a grandchild of the eldest son. In either case, such heir, whether second son or grandchild, takes the succession as the immediate and only heir of the marriage; free from the debts and deeds, and consequently unaffected by the discharges of the eldest son, who predeceased his father. But the rule applies with double force, to the case of a person holding, like Mrs Routledge, not a proper *jus crediti*, but a mere expectancy. The claim was always defeasible during her father's life, and it would be unjust to suffer her to extinguish a right, which it was uncertain at the time whether she would ever possess; and which, in point of fact, she never did possess. That a father, bound by a marriage contract, to settle his estate upon the heirs of the marriage may, during his life, give implement to his eldest son, is a proposition unnecessary to be considered. Such expectant heir obtaining a conveyance during the father's life, acquires the es

the *præceptione hereditatis*. But it by no means follows, 1811. that though he may thus receive honest implement of his father's obligation, he may enter into a transaction for discharging a right, of which he is not in *pleno jure*, and as to which, even the expectancy that he possesses vanishes upon his own death before the father, and passes to the true heir of the marriage alive at the father's death. In support of these doctrines, the pursuer referred to Erskine, p. 602; Dirleton's Doubts, p. 25; Stewart, p. 145; MacConnochie against Greenlees, 12th January 1780; Trail against Trail, 7th January 1787; Fotheringham against Fotheringham, 20th June 1797.


On the other hand, on the part of William Thomas Carruthers and his guardian, it was denied, that there was any sufficient evidence, even of the identity of Mrs Routledge, with the child born of Mrs Carruthers; and as to the question of her legitimacy, admitting in its fullest extent the force of the maxim *pater est quem nuptiæ demonstrant*, still it is clear, from the doctrine of all the authorities, that it cannot of itself establish the *status* of Mrs Routledge, or be held as *probatio probata* to the exclusion of all opposite proof. On the contrary, it only amounts to a legal presumption, which, in all cases, yields to positive evidence, that the husband, from absence or other causes, could not possibly be the father; and such evidence is actually before the Court. It is admitted, that for ten years the parties had lived together without having any children, or the least prospect of children. It is proved, that Mr Carruthers had gone to England in the beginning of August 1740, and had remained there till the month of November. It is established beyond a doubt, that Mrs Car-

1811. Carruthers's criminal conduct began in August ; and it is admitted, that her husband, upon his return from England, was informed of her profligacy before he reached Dormont ; upon which he dismissed her from his house, and never afterwards lived or had the least communication with her. Again, it is proved, that her delivery took place on the 28th May, at which period the child was come to the full time ; and, putting all these circumstances together, it is an absolute impossibility, that Mr Carruthers could have been the father. With regard to the tailzie 1708, it is plainly an effectual deed ; and as to the objection of prescription, it is to be observed, that prescription could not begin to run against it till Mr Carruthers had made up his titles to the lands ; but as these were not expedite till 1740, while Mr Carruthers died in the 1773, no complete course of prescription has elapsed ; and, besides, in the settlements which he executed in 1759, after the transaction with Mrs Routledge, he restored the heirs of tailzie, 1708, and thereby excluded prescription.

Referring to the compromise which took place in 1759, it is denied that there was the least ground for stigmatising it as unfair or unequal. The very names of Lord Pitfour and Lord Covington afford a sufficient answer to the imputation of injustice ; nor is there any reason to suppose, that these eminent men had adjusted the price of Mrs Routledge's eventual interest, with less care or deliberation than they would have employed as arbiters in any other dispute ; while, as they had been counsel for the parties in the previous action, and were well acquainted with the precise nature and extent of their rights, they

were of all men the fittest to act as judges between them. 1811.
 But the settlement was besides extremely favourable to 
 Mrs Routledge, for at that time the rental of the estate
 of Dormont did not exceed L.120; and even under the
 contract, Mr Carruthers had full power to sell the estate,
 and to dispose of the price as he thought proper. On the
 other hand, in case of an heir male by a subsequent mar-
 riage, Mrs Routledge's claim was limited to L.1000, at
 the utmost; and how can the transaction be possibly held
 as iniquitous, by which she at once got possession of
 L.650 in place of L.1000, depending upon her father's
 life?

Lastly, Mrs Routledge's right to grant the discharge
 seems to admit of as little doubt; since it is clear, that she
 had in her the whole *jus crediti* under the marriage con-
 tract, and the error of the pursuer's argument, upon this
 point, arises from his taking a view of the substitution to
 the heir of a future marriage, not consistent with the set-
 tled rules of law. It is distinctly laid down by Mr Er-
 skine, (B. 3. tit. 8. § 39.) that the father lies under no re-
 straint with regard to those substitutes who are called by
 the marriage contract, after the issue of the marriage.
 His contract is with the wife and her relations, who are
 only interested in the succession so far as it is provided to
 the wife's issue. But, with regard to the remoter substi-
 tutes, the husband's contract is with himself alone, and
 the substitution, like a simple destination, may be altered
 by him at his pleasure. The substitution, therefore, in
 the contract 1735, to the heirs male of a future marriage,
 inferred no *jus crediti*, because it was in Mr Carruthers'
 own power to alter or expunge it from the contract. It

1811.  was entirely *jus tertii* in any question between him and the heirs of the marriage; he had it completely in his own power, and could put an end to it when he pleased. The whole *jus crediti*, therefore, created by or existing under the marriage contract, was vested in Mrs Routledge as completely as it could have been if she had been the eldest son of the marriage.

That the heir of a marriage has vested in him a *jus crediti* against the father, during the subsistence of the marriage, and may compel implement in so far as the contract requires any thing to be done in furtherance of this right, are propositions which the pursuer admits; and yet he contends, that though Mrs Routledge was the heir of the marriage, she had no *jus crediti*, but only an expectancy, which she could not discharge. It is true, that the beneficial exercise of her right depended upon contingencies; and this is true, of a proper *jus crediti*, even in the person of the eldest son of a marriage, because it is always so far conditional, that it may be defeated by his predeceasing the father. But this can never make the right itself less complete or effectual. The heir is still vested with such right under all its conditions. He is entitled to take full implement, if the father be willing to give it; and it is of no importance, that by doing so he may happen to disappoint his own issue, or any other substitute heir. But if he is entitled to discharge the contract upon full implement, it follows that he may transact or compromise it, since that must always be held as implement of an obligation, which the creditor receives and acknowledges as such. Again, if the immediate heir of a marriage, whose right is admitted to be

defeasible upon his predeceasing the father, he nevertheless 1811.
 less entitled, during the standing of the marriage, to
 take satisfaction of, and discharge, the contract, and
 thus to extinguish the hopes of all the substitute heirs;
 this must apply *a fortiori* to the situation of Mrs Rout-
 ledge, since the only substitution in her case was com-
 pletely in the power of Mrs Carruthers, the party with
 whom she was contracting; and there were no younger
 children to disappoint, because the marriage had been
 dissolved. . Being therefore the only heir of the marriage,
 and no substitution existing but what Mr Carruthers
 could put an end to; and being, moreover, *ex concessis*, en-
 titled to discharge the contract upon implement, she had
 of course an undoubted right to transact it for what she
 herself held and acknowledged to be implement. As to
 the authorities referred to, they rather aid the plea of
 the pursuer, since they proceed upon the uniform admis-
 sion of the right of the heir vested with the *jus crediti* to
 discharge it upon implement.

Upon these pleadings the case was advised by the
 Judges of the First Division of the Court, (19th February
 1811), who delivered their opinions as follows:

LORD CRAIG.

I shall deliver my opinion very shortly, and state the
 reasons of it. This case has been very ably treated by
 the counsel, and resolves into certain points. If any
 one of these be determined in favour of the defender, it
 puts an end to the action; but they must all be deter-

1811. mined in the pursuer's favour before he can succeed.
 The first point is, whether the mother of the pursuer was a legitimate child or not. Upon this point I have no sort of doubt. That her mother was a woman of profligate character, and was on many occasions guilty of adultery is certain ; but, on the other hand, it is perfectly clear, that this lady must be held to have been the legitimate daughter of her parents. The maxim *pater est quem nuptiæ demonstrant* is founded on reason and expediency ; and in this case, however great may be the guilt of the mother ; however uncertain it may be who was the real father ; still, at the time the child was begotten, the parents were married, and there is no defect stated ; no physical impossibility, from distance or otherwise, of the husband being the father. It would be most dangerous, in circumstances of that nature, to enter into any investigation, or to allow a proof, that the child was not a lawful child. The law holds that she was lawful on good principles ; and to allow any inquiry or proof to the contrary, would just be to shake the security of marriage. It is said, that the father was from home some forty or fifty miles. It is not stated when he went away, or when he returned, and therefore it is clear in law, in reason, and in expediency, that this child must be held to be legitimate.

The second point regards the effect of the deed 1708, considered with reference to the deed 1735. I doubt very much whether the former deed can be considered as any bar to the contract of marriage. I am not satisfied that any clauses in the first of these deeds can make it an entail so as to prevent the deed 1735. The strongest clause is that

which prohibits different provisions in case of the marriage of the heirs, to a greater extent than a third part of the rent of the estate; but that plainly contains no bar. 1811.

A variety of cases are quoted on this subject. The case of Dalhousie comes somewhat near the present, but is not strictly analogous. Even upon this point alone, therefore, I have great doubts, whether there is any thing in the deed 1708 to prevent the deed 1735. After the deed 1708, the deed 1735 takes place, and thereafter titles continued to be made up upon that deed, and on these titles the estate has been held in fee-simple ever since. There is therefore nothing in the one deed to bar any right arising on the other.

I now come to the third and last, which has always appeared to me the most difficult point; namely, what is to be the effect of the discharge; is it a valid discharge or not? Is it a bar to the action of reduction that is now brought? If it be, there is no claim under the contract of marriage. After deliberately considering this subject, I lean to the opinion which I first conceived, that this discharge, under the circumstances of the case, is not valid. It was granted while this lady was a minor, having no person to assist her; her father having not only unnaturally thrown her off, but wishing to disappoint her legal right. Under these circumstances, without any one to look to for advice but her husband, who was then in very involved circumstances, she grants this discharge for the benefit of his creditors. This is not all; for, with regard to the subject, she was not in the just right arising from the contract of mar-

1811. riage. Certain events might happen to disappoint her right, and, in that case, she had nothing under the contract but a thousand pounds, while, under any view, she had only a *spes successionis*, a sort of expectancy depending upon a contingency not yet arrived. I think it very doubtful whether she was in a situation to grant this discharge; for if such were to be allowed, we might disappoint the marriage contract altogether. A person in a state of expectancy, a sort of expectancy of expectancy, if I may call it so, has no power to execute such a discharge. In that situation, the opinion that I have formed on the whole, is, that without knowing what her right was, she was not entitled to grant a discharge that was to be effectual against herself and her issue. With regard to the decree-arbitral, I was a good deal struck with it at first, but the validity of the discharge was not before the arbiters. The submission was merely a mode adopted for giving effect to the discharge, the merits of which were not at all considered by the arbiters. The objection to it still remains, that she was made to discharge a right that was not in her. Various decisions have been quoted, particularly the case of Fotheringham, which appears to me to have been very different, and not to have gone the length of the present. The person there was in the full right of the *jus crediti*. There was not a renunciation, but fulfilment of the contract of marriage. The circumstances there were very particular, and do not apply to this. The case of Stewart appears to be very much in the same situation with that of Fotheringham. There was such a right vested in the heir as enabled him to discharge. Upon the whole, I am for sustaining the reasons of reduction.

LORD SUCCOTH.

Although I concur entirely in the opinion just delivered; yet I think it proper, in a case of such importance as the present, to state the grounds on which I come to that conclusion; and it is the more especially necessary in this case to do so, because we are told that that opinion is contrary to cases which have been solemnly decided in this Court. I shall take up very little time with the question of legitimacy, because it does not appear to me to be attended with any difficulty. Connected with that question, there is a question of identity, on which I shall say nothing, except that I think it clear, that the mother of the pursuer was the child born by Mrs Carruthers of Dormont, during the dependence of the process of divorce. With regard to the legitimacy, I concur entirely in the maxim *pater est quem nuptiæ demonstrant*, which is founded on strong reasons of policy, as well as of law, and cannot be got the better of, unless it is made out clearly that there was an impossibility of the husband being the father of the child. In this case, I do not think that that is clearly made out. I think it necessary, in order to get the better of that sound and salutary maxim, that the husband should be clearly established to have been absent from his wife for a considerable time, both before and after the birth of the child, and at such a distance as rendered any intercourse impossible. I don't think that either the one or the other of these points has been proved. As to the first, we have the evidence of two or three witnesses, and the one that swears most distinctly, states, that the husband left home about the term of Lammas, which may apply to a few

1811. days after it. In this respect, the proof is by no means precise; but it is still more deficient in the other particular, and certainly does not shew that the husband was at any very great distance from his wife. I do not know that it is the law of this part of the island, that the husband must be beyond seas, but, at all events, it is necessary that he should have been at such a place and such a distance from the wife, that any intercourse was impossible. It is said that he had gone to England; but your Lordships see that his own house is not far from the border, and that in a few hours he might be both in England and at home. The proof, therefore, is clearly not sufficient.

The second point is attended with much greater difficulty; I mean the validity of the transaction relative to the discharge. In forming my opinion upon this point, I don't think it necessary to go into the question, whether the transaction was equal or unequal. Neither shall I enter into that other question, whether there was any objection to the submission arising from this, that there was a previous agreement, settling the terms of the discharge on the one hand, and the sum to be afterwards paid, on the other. I don't know that this forms any objection to the decree-arbitral. But, in this case, it is still less necessary to consider it, because, whether there was a submission or not, the question is, supposing nothing but this discharge, was she in a situation which could enable her to grant it? It is therefore most essential to consider; 1st, In what situation the heir in this marriage contract was, when she entered into the transaction in question. Her father's marriage contract settled the estate on the heirs male of the marriage; whom failing, the heirs male of

Francis Carruthers in any subsequent marriage; whom 1811. failing, the heirs female of the marriage, and their heirs male; whom failing, Francis Carruthers' nearest heirs and assignees whomsoever. As the marriage was dissolved by the divorce after the birth of Mrs Routledge, there could be no heir male of that marriage; but it is equally clear, that there might have been a second marriage, and an heir male of it; and if that had been the case, it would have restricted her eventual right to L. 1,000; in short, it appears that her right, at the time she entered into the transaction, was merely a contingent right. I am inclined to hold, that, in a legal point of view, the heir of the marriage, in such a case, during the life of the father, has nothing but a mere hope of succession,—an eventual right, which depends entirely on his surviving the father, or dying before him. In this case, it is admitted that Mrs Routledge died before her father, and, upon that event, her right, as appears to me, fell to the ground. It accrued to her son upon her death. He came in her place, and survived the father, and by so doing the full right vested in him. Her son did not represent her, and her claim to the estate could not be extinguished by her discharge, when she had not the right. In that situation, it appears to me that she could discharge or give up nothing but her own chance; and that she did give up her own chance for L. 650, which I dare say the other party was well pleased to give, taking it for granted that she would survive her father. With regard to the decisions that have been stated on both sides, there was a case founded on upon one side, which does go a good deal in point of principle to the opinion that I have expressed. It is the case of MacConochie, though it seems to me rather to confirm the

1811. doctrine, that a discharge granted by an heir of a marriage predeceasing the father, will not be effectual, since it was there found, that an assignation granted by the heir was ineffectual, she having died before her father; and, although it was strongly maintained that her mother had died, and thus fixed the right of the conquest, still it was found that her discharge was not valid. In short, the case appears to me very much the same in principle with the present. Upon looking into the papers in that case, I see that there was a very great deal of argument upon the general question, as to the effect of deeds granted by heirs, having rights under contracts of marriage, and several cases are quoted on one side, where such deeds have been sustained. But the answer uniformly made to all these cases is, that in all of them these deeds had been rendered valid by the heir's surviving the father. That was the answer in point of law in that case. I see it pointed out in the conclusion of the report, where it is said that the deed granted had been validated by the father's predecease, whereby the right had become complete.

It has been maintained, that there is a much more similar decision, where the Court found the discharge of the right effectual; namely, the case of Fotheringham. I have paid every attention to that case, which I had the honour of pleading along with your Lordship; and from looking into the notes of what took place at the time, and attending to the report, I am convinced that that case does not decide the present. It was materially different, in two respects; first, because there was implement of the contract by the mother, disposing the estate to the second son during her own lifetime; and, secondly, because the party

outlived his father. It is very true, that a great difference of opinion prevailed on the Bench ; but it is clear, that the difficulty which arose related to the nature and effect of a devolving clause, which has nothing to do with the present case. One set of Judges thought, that the devolving clause could only operate once ; another thought, it operated as long as there was a younger son of the marriage existing ; and it was upon that question that the Judges differed. It appears to me clear, that in that case, by the conveyance of the fee to Alexander Fotheringham, the estate of Balfour became vested in him as much as if he had succeeded to it in the course of nature, by the death of his mother. In that situation, and having survived his eldest brother, he entered into a transaction with Norman, to purchase up any claim which Norman might suppose himself to have under the devolving clause. Norman then survived his father ; Alexander succeeded to Powrie ; and Norman having thus come to be vested in the full right, his deed was thereby validated. It was said, that it was not the father's death, but the mother's, that was material ; but it is clear, that it was the father's that was material, for the mother had parted with the fee to Alexander, in the same way as if she had been actually dead. The difficulty arose from there being thought to be a sort of entail.


1811.

The case of Trail was a case where the fee was disposed during the life of the father and mother to the heir of the marriage. To be sure that was a very strong case, and perhaps went rather far. The father granted a disposition to his eldest son, as heir of the marriage. It is said that the eldest son did not accept ; but I think it

1811. would appear, that he had arrived at majority before his death; and as he made no alteration of the destination, he must have been held by the Court as having fairly accepted of the disposition in his favour; since, having become major, he had done nothing to the contrary. In the present case, if the father had implemented the contract, by disposing the fee to Mrs Routledge, reserving his own life; and if she had then entered into any transaction with him at an after period, whereby she had conveyed the estate to him for a sum of money, that perhaps might have been a legal transaction; and I don't think that there was any thing that could have prevented the parties from doing this; for after the divorce there could be no heir male of the marriage, and the destination could not have hindered him from conveying the estate to her. Upon the whole, therefore, I agree that the discharge is not a valid discharge, to the effect of binding the son of Mrs Routledge, who does not represent her. The case of Stewart does not go to alter my opinion. If I had seen it clearly made out, that in that case the son had survived the father, it must have given great weight to that decision. But all that I can say at present is, that I see no evidence that such was the fact; and it rather appears to me, that the presumption lies the other way. I did lay some weight at first upon one of the estates having been disposed to Robert the son; but it is a matter of great doubt whether he did not die before his father. Indeed a great deal of the argument seems to turn upon the son never having made up titles by service to his father. Now, how is it possible for him to have made up titles in that way unless he had survived his father? so that the argu-

ment is absurd, unless upon the supposition that he did survive his father. In the mean time, it is enough that the contrary is not made out by that case. 1811.

There is still remaining the third point, viz. the effect of the contract 1708, and of the entail said to be comprehended in it; because, if the defender is well founded in his plea upon that deed, he must succeed to the estate. In considering this matter, I shall not go into the question, whether the deed 1708 was an effectual entail or not. There are certainly strong clauses in it; but, as it appears to me that even if there was an entail it is now prescribed, it is unnecessary to enter into that previous question. I have no doubt that it is prescribed. It appears, that no infestment ever followed upon it—no title was ever made up upon it, and it therefore remained a personal and latent deed, never acknowledged, and never acted upon in any shape, until it made its appearance in this cause. John Carruthers was in apparency. Francis was also in apparency when he entered into his own contract. His marriage contract in 1735 contained an obligation to make up titles. In 1736, Francis took out a charter from the Crown, to his heirs and assignees whatsoever; and this charter comprehended all that was held of the Crown. Infestment followed, and that completed the titles. In 1739, he obtained a precept of *clare constat*, as heir to his grandfather. In none of these titles was there the least mention made of the entail. They were made up to the estate in fee simple. It is also proper to observe, that the destination in the deed 1735, was materially altered from that of 1708. Before 1736, it was necessary to expedite services; and one of these was, no doubt, a service as


1811.  heir of provision under the deed 1708; the second, as heir of line of John his grandfather, and likewise of Francis. He had no other way of making up titles to certain lands, for which purpose it was necessary to serve under the contract of marriage. But the destination had been previously altered. I certainly at first did feel some difficulty, from the service as heir under the deed 1708, because I was at a loss to see, whether it was not an acknowledgment of the entail, if there were such in the contract. But it appears to me that, though that service was expedient only for the reason that I have stated, he made up his titles, both before and after, in fee simple, and showed, by every means, that he knew nothing about, or did not acknowledge, the entail of 1708; and I do not think, that one of these services should be sufficient to infer any homologation of that entail, or to save it from the negative prescription. Besides, it was the duty of the heirs to step forward, and take measures for compelling him to acknowledge the entail. It was within the 40 years, and it would have been perfectly competent for them to have done so.

In the case of Welsh Maxwell, it was said to be found that an entail could not be cut off by the mere operation of the negative prescription. I have certainly looked into that case; for it did appear to me, that there was a great deal said to show that it applied; but I think it materially different. No title, contrary to the entail, had been made up in the person of any of the heirs who possessed the estate, having in them the double character of heirs of line, and heirs of entail; and there having been no alteration by any subsequent deed, it was held,

that the heirs had possessed in the character of heirs 1811. of entail. This is clear from the report. In the present case, there was an act done to authorise the legal interposition of the substitute heirs; for there was a contrary title made up by Mr Carruthers, and a different destination from that of the contract 1708. There was no change in the destination in the case of Welsh, which, in all its material circumstances, was different from the present. The Court ultimately found, that the heirs, having both characters in them, were to be held as possessing under the entail. But, in this case, there is ground for holding that the entail was cut off by the negative prescription. The settlement 1759 had no connexion with the entail. Whether the positive prescription applies or not, I am not sure; but, at any rate, the negative is sufficient.

LORD WOODHOUSELEE.

With regard to the first question that we are called upon to consider, whatever doubts I may have in my own mind, whether the pursuer's mother was really the daughter of Mr Carruthers, I have at least no doubt as to the law which must presume so, unless circumstances be proved which render it impossible. No such circumstances have been proved. Mr Carruthers was married to the child's mother, and the presumption of law is, that he is the father, living and cohabiting with her 10 months before the birth. It does not take off this presumption, that acts of adultery have been proved against the woman during that period; for the law, notwith-

1811.  standing, gives effect to the presumption, which nothing short of impossibility is sufficient to overturn. I cannot conceive myself at liberty to make any doubts of my own the ground of deciding on this question. The law holds this child to be in possession of its legal *status*. It is plain that the full period of maturity, ten months, is sufficient to bring it within the time of the husband's cohabitation with the wife.

The next point is, the argument founded on the contract of marriage 1708. The defender maintains, that the post-nuptial contract was a deed *ultra vires* of the husband, as he was barred by the terms of the former deed, which it was said was a strict entail. With regard to this, I shall only say, that if this strange deed is found to contain a valid entail of these estates, so as to bind up the hands of the heirs in possession, it requires much greater ingenuity than I possess, to see the grounds of such an opinion in any of the clauses of the deed. This extraordinary settlement has never been the settlement of the estate. It was a latent deed from the beginning; never recorded, no title made up upon it, and the lands held in fee simple, without regard to it, for a period far exceeding the years of prescription. In short, it is departed from by the whole course of the investitures.

The next question regards the effect of the discharge, namely, whether Mrs Routledge was in a situation to grant a legal discharge to this extent? With regard to her right to enter into this transaction—to compound, for a sum of money, her interest in this estate, I do conceive, that, while her father was alive, there was no such

right vested in her person, as to warrant her in renouncing 1811.
 for herself and children the title to this estate. She had
 no *jus crediti*—nothing more than a bare hope of succes-
 sion. The succession never opened to her. Was this
 hope a right which could be made the subject of bargain,
 and of transactions? Could she transact and discharge for
 herself and all her children? I do conceive that she had
 no such right. It never belonged to her, but remained in
 her father's person to the day of his death. Her own
 heirs had an interest, which she could not affect, in any
 way whatever. The cases of Fotheringham and Trail
 were both materially different from the present. In the
 case of Fotheringham, the person who granted the dis-
 charge survived his father; and, in the case of Stewart,
 Robert, the granter of the deed, appears to have also sur-
 vived his father.

LORD BANNATYNE.

Upon the first question, namely, the legitimacy of this
 lady, I have no doubt. It is the presumption of law that
 she is legitimate, and there is nothing proved in evidence
 to take off that presumption. Indeed, her father acted
 as if he himself was convinced she was his lawful daugh-
 ter, and the true heir of the marriage; for this very trans-
 action is founded upon his own acknowledgment of her
 legitimacy; because, if she was not legitimate, she was
 not entitled to grant the discharge.


The second question is, Whether Mr Carruthers had
 power to enter into the contract 1735? The objection to
 his power is founded on the entail 1708. It appeared to

1811. me that this was not an entail, though the later decisions created considerable difficulty; but, at any rate, it is clearly cut off by the negative prescription; and it is equally clear, that these defenders have no right to challenge the contract. Could Francis Carruthers himself have challenged it in his lifetime, as being contrary to the deed 1708? I apprehend not; and, as they represent him, they are clearly barred, upon that ground, from challenging it.

Then, as to the remaining question, I am clearly of opinion, that Mrs Routledge neither was, nor ever came to be, in a situation that gave her power to discharge the provision in the contract of marriage. I think this perfectly consistent with the case of Trail, though I think that a very doubtful case at present. It is perfectly consistent with the cases of Fotheringham and Stewart; for she never was in a condition to entitle her to demand implement, and therefore never could discharge the right.

LORD BALMUTO.

This is a case of great importance. In regard to the legitimacy, I entirely concur with the opinions already delivered. This lady was born during the subsistence of the marriage; and whatever suspicions we may have, arising from the conduct of the mother, she must be held in law to be a legitimate child. With regard to the contract 1708, nothing followed upon it; it was never carried into effect; and though Francis Carruthers was served heir of provision under it, yet he made up titles directly contrary to it, and therefore I consider it as no bar to the

contract 1735. My only difficulty is, as to the discharge 1811.
in 1759. I hold that, by the judgments pronounced in 1729 
in the cases of Stewart, Trail and Fotheringham, a general
principle was established, that it was in the power of the
father to contract with the heir of the marriage, and that
he could contract validly with such an heir. It has been
said, that the heir survived the father; but I don't see
that this happened in the case of Stewart, and in the case
of Fotheringham the mother survived her son. Pitfour and
Lockhart were masters of this subject, and must have
known the judgments so recently pronounced. Lockhart
was one of the arbiters named in the contract 1735; he
was counsel in the divorce, and in the action at their in-
stance in 1758, claiming under this contract of marriage.
They determined and fixed the transaction; and these
two eminent men having sanctioned what they understood
to be a valid and effectual contract, I am not now inclin-
ed to disturb it.


LORD PRESIDENT (BLAIR.)


This is a case of considerable moment to the parties,
and as being connected with several important branches of
the law, I shall therefore give my opinion fully upon the
several questions that have been agitated; taking care to
avoid repetition as far as, that is practicable, where differ-
ent Judges are speaking to the same points.

The first question is the legitimacy. This gentleman,
Mr Routledge, comes before us claiming as heir under
the marriage contract, entered into betwixt Francis Car-
ruthers and his spouse in the year 1735. In order to

1811. make out his claim, it is necessary to prove that he is a lawful descendant of that marriage,—not an immediate descendant, but that he is the grandson of the parties, or the son of one who he must shew was an immediate lawful descendant from them. The *onus probandi* does lie upon this gentleman; and in what manner does he make it out? With respect to his own legitimacy there is no doubt. But this is not enough; he must shew that his mother was a lawful child of the marriage betwixt Francis Carruthers and Margaret Maxwell, who were the parties to the contract under which he claims. Now, in what manner is this proved? We have most direct evidence that Margaret Maxwell, Mrs Carruthers, during the subsistence of the marriage, on the 28th of May 1741, was delivered of a female child; and it is proved beyond a doubt, by a very singular concatenation of circumstantial evidence, that the mother of this gentleman was that identical child, born under such inauspicious circumstances—the child of misfortune, we may call her, from her infancy,—tossed about by various casualties, till at length she is married. Then, it being proved that this child was born of Mrs Carruthers, there the proof stops; and there it must stop in every case, because it never can go farther. It is proved that during the marriage she was delivered of this child; and in place of proving farther, the pursuer refers to the legal maxim of which your Lordships have heard so much, and which I say is the foundation of every man's birth and *status*. His birth is a fact that may be proved by witnesses; but the conception is a fact which never can be proved; and he therefore stands in the same situation as every other man possessing the legal character of legitimacy. He proves


that he is born of this lady ; and having proved this, the 1811.
law takes him under its protection, and says, *Pater est*
quem nuptiæ demonstrant. It refers to a plain and sensible
maxim, which is the foundation, the very corner stone
on which rests the whole fabric of human society ; and if
you allow that to be once shaken, there is no calculating
where the consequences may lead. It is said that this
lady was not very scrupulous or correct in her manners ;
but does this take away the legal presumption ? No, my
Lords ; the counsel for the defender had too much good
sense ever to dream of such a thing. To suppose that a
man, claiming to be served heir to his ancestor, must, be-
fore making out his legitimacy, stand trial for his mo-
ther's delinquencies ; and that, until her character come
out pure and immaculate, he is to be denied his service ;
or that, under such circumstances, a proof should be al-
lowed to lay open the history of her whole misdemeanours
and gallantries, in the midst of a licentious age, the con-
sequences would be monstrous. But then, does this pre-
sumption, which is of so much importance, yield to no-
thing ? Is there no way in which it can be got the better
of ? These questions Lord Stair, that oracle of the law of
Scotland, has long ago answered. He tells you, that the
presumption holds in every case, unless you can prove
the impossibility of connection. He rather seems to ri-
dicule the idea that prevails on the other side of the Tweed,
that there must be a separation between the parties ; that
the sea must be between them. He says that the law of
Scotland does not require this. It only requires proof of
the impossibility, whether by distance or otherwise, of the
party's being the father of the child. He states it as suf-
ficient to take off the legal presumption, if, during the

1811.  time when the child must necessarily have been conceived; there was an impossibility of the father having begotten it. This does not depend upon the distance merely; for suppose the father and mother were confined in separate prisons for a twelvemonth, where it is utterly impossible for them to have access to each other? In this and other such cases the presumption must no doubt give way to the fact, wherever a kind of impossibility is proved of intercourse between the parties. Let us see how this turns out; because we have here an absence of the husband alleged, which it is said made it impossible for him to be the father. The law holds (whether right or wrong is a physical question) that the longest period of gestation is ten months. *That* the law holds, that a child born at the distance of ten months is a lawful child, and the shortest period is six lunar months, from the favour which the law shews to legitimacy. So Lord Stair says it has been decided. He does not indeed mention any of these decisions, and I own I do not know where they are to be found; but he states it as having been so decided, and such is the undoubted rule of law. Let us apply this to the present case. Mr Carruthers is said to have gone to England in August 1740, on what day of the month does not appear from the depositions of any of the witnesses, or from the pleadings on either side; but he himself has furnished us with complete evidence upon this subject, because, in a memorial given in to his own counsel, he states it to have been the 18th of August. Now the child was born on the 28th of May, and counting back from that date to the day of his departure from Dormont, in place of ten months you have only nine months and ten days from that time; an irregularity

which very frequently happens, and from which no person 1811.
 could ever pretend to infer an impossibility of his being 
 the father. Suppose Mr Carruthers had died—that in
 place of going to England he had gone to the other world ;
 would this have prevented the child from being lawful ?
 I apprehend not. No court of law on earth would have
 held it to be illegitimate. Again, count the six lunar
 months back from the 28th of May, and this brings you
 almost clear of the month of November. It is admitted
 that he returned in November. Suppose he had returned
 on the very last day of November, still the six lunar
 months have elapsed ; so that take it the one way or the
 other, the child is still a lawful child. But we are going
 a great deal too far here ; because, what was the absence
 in this case ? All that we are told about it is, that he went
 to England, or that he was on the border, a distance I
 suppose of 20 miles from his own house. How far he
 went into England, what he was doing there, or whether
 his absence was without intermission, we are left to con-
 jecture. Where was the probability that he might not
 have stept back from the border to his own house ? We
 have no proof of where the lady was during this time.
 We get a sight of her now and then it is true, and she
 does not seem to be employed in the best manner. But
 is there any impossibility in her having contrived to go
 to the border ; and whether the husband go to the wife, or
 the wife to the husband, I presume there is very little
 difference. The general question goes deep into principles
 of law, and for that reason it is necessary to have a full
 view of the facts.

The second question relates to the effect of the con-

1811. tract 1708; as putting Mr Carruthers under a disability to execute the subsequent contract in 1735. This contract was much disapproved of by the counsel on both sides, who all abused it. I am not quite sure if it merited that abuse; very verbose it is, indeed, I admit, but it appears to me to contain all the essential parts of a good valid entail. Whether it contains clauses sufficient to make the subsequent deed null may be a difficulty; but it is unnecessary to consider it, because the question is, whether it is not cut off by the negative prescription; and I am perfectly satisfied, that no man can look at the titles, without being clear that it was completely cut off by the negative prescription. It is more than a hundred years old, and what has been done upon it? Nothing on the face of the earth, except that Francis Carruthers made up a title upon it, which he immediately laid aside. It was then thrown past, and lay latent in the charter chest of Dormont, till it was found accidentally by some person rummaging there for papers to produce before the Court of Session. I have no doubt that it is cut off by prescription. And there is another plea suggested by the Court, which has not been taken the smallest notice of, but which I think invincible, Who was the party that entered into the contract 1735? Was it not Mr Francis Carruthers? Could he have pleaded against his own deed, and said, to be sure I did so and so, but I had no power to do what I did? I apprehend not; and if he could not have maintained such a plea, is it one bit better when it comes in the mouth of his heir male, who takes his estate? He is the person who represents his ancestor; and in place of holding it *ultra vires* of him to execute this contract, he must be bound by it himself. This is a plea to which no answer can

possibly be made. The pursuer was entitled to bring his 1811.
action for implement of the contract 1735. 

The last point is attended with some difficulty. It is impossible for any person to look at the case without being struck, at first sight, with the apparent singularity of the fact, that here is an action brought to make effectual a right which has been long ago discharged; and the discharge witnessed and authorised by two of the greatest lawyers that ever did honour to this Court;—men who stood long unrivalled at the head of the bar, and whose characters were equal to their legal knowledge. If I had seen, or if I supposed that they understood the discharge to have the effect which is now ascribed to it, I should hesitate, indeed, and deliberate well before I gave way to any opinion of my own. But I am sure they did not differ in one single point from the opinion which I am now to deliver; satisfied that they neither did nor could mean to give such an effect to this discharge, which comes here bearing the signatures of their great names. In examining this matter, the first question is, what was the situation of this lady in point of right? And what power had she of alienating her right? It is perfectly clear, that at the time when the discharge was granted, she was not properly the heir of the marriage, because the destination must remain *in pendente* till the father's death. That event fixes it in the person who is the heir of the marriage, and who is nearest at the time the succession opens. A person may be nearest for the time being. He may have a chance of succession depending upon contingencies; and, accordingly, she was the person who had the greatest chance, but depending upon two contingencies; first, upon her father having heirs male by another marriage; and, secondly, on

1811. her surviving him. If she died, her heirs had no claim ;
and if he had heirs male, she had as little right. Having, therefore, not a vested right, but a mere expectancy, what title could she convey to any person? The fair answer is, that the utmost she could either discharge or convey, was the expectancy which she herself possessed. Her chance, her hope of succession, the lottery ticket that belonged to her, she could freely give away. If it came up a prize it was very well, the discharge was good ; but, whoever contracted with her, took the right precisely as it stood in her person, subject to all the consequences. It has been commonly said, and I think justly, that heirs of a marriage differ from other heirs expectant, because they have a *jus crediti*. But what is the nature of it, and what does it really import? It goes merely this length ; that it prevents the succession from being altered or defeated by the gratuitous deeds of the father. But with regard to the succession in the father's lifetime, there is no difference between them and any other heirs whatever. Indeed I might venture to say, that wherever there is a destination, simple or otherwise, no right vests in the heir who stands nearest, till the death of the person, at whose death the succession is to devolve to him ; so that if he dies in the mean time, he just drops out of the succession altogether, and all his debts, discharges and conveyances, go for nothing. Suppose a man's eldest son chuses to sell his father's estate, that is, his expectancy during his father's life : whether the law would pay any regard to such an infamous transaction I know not, but sure I am, that your Lordships would pay no regard to it, farther than concerned his own right ; and that, if he died before his father, all his deeds and discharges would fall to the ground. Nay, the proper primeval principles of the law

of Scotland go a great deal farther; for unless the right is 1811.
vested in him by a complete service, all his deeds die
along with him. They all pass away, except in the cases
provided for by the act 1695; and when that does not ap-
ply, the rule still remains, even in the case of an apparent
heir. But what shall we say of this woman? She never
became an apparent heir—she never reached that length—
she never had any thing beyond this defeasible expectancy.
In the course of the argument, the counsel for the defend-
ers chiefly relied upon certain decisions, particularly in
the cases of Trail and Fotheringham. One of these I had
good access to know, being counsel in it. I remember
very well, that the opinion of the Court was unanimous,
or nearly so, upon what I understood to be the main
point at issue, viz. whether a father under a contract was
entitled to anticipate the succession—to put it forward as
it is called; that is, whether he had it in his power to give
the estate to him who was heir expectant at the time; and
whether this could be held as implement of the contract of
marriage. But every argument from reason and justice,
and every legal argument, is in favour of the decision in
that case, that a father has such power, and why? A fa-
ther is the person who is to implement the contract of
marriage. That is dispensed with till the time of his
death; but suppose, for good reasons, he chose to wave
this, and to fulfil it during his life; and provided he does so
fairly and fully, what objection can there be to it? I
should think it were carrying the law far indeed, if you were
to set aside a transaction, in which a father does more than
justice to the heirs of the marriage; for he gives up his
own liferent; and, therefore, I understood it to be settled
at the time, that there was nothing to hinder the father
from doing so, provided he gave fair and full implement,

1811. as was done in the case of Fotheringham. How would this matter have stood here if the fact had been different; that is, if in place of endeavouring to get this poor woman inveigled into a transaction by which she sold her birth-right, Mr Carruthers had said, that he wished to perform his contract, and had granted a conveyance of the estate of Dormont in her favour? I should have thought the contract fairly implemented; but upon her death, would the estate have returned to the family? By no means; it would just have gone to Mr Routledge. Where then is the analogy betwixt allowing a father fairly and squarely, without equivocation or circumvention of any kind, to make over his estate to his son; and, allowing him during his own life, to take advantage of his children who are dependent upon him, and to stipulate for a surrender in his own favour of their birthright, under the contract of marriage; and for what? For some absolute trifle, such as this L. 600. I was surprised to hear a distinction attempted to be drawn, and dwelt upon by the counsel for the defenders, upon this part of the case, as if, although such a transaction must be held to be unlawful and reprehensible in regard to third parties, yet there could be no harm in it, when a father and his children were the parties. My idea is directly the reverse; because, even suppose it were lawful in regard to third parties, which it clearly is not, still it is highly proper to draw close the strict rules of law, where a father is transacting with his children; for it is impossible to conceive a situation in which the parties are more unequally matched, or where the father, if his own conscience does not restrain him, is more completely free from every other check or restraint, whether from law or otherwise. He knows the exact state of the lands, the amount of the rents, the debts and incumbrances, the precise

condition and value of the different parts, and the whole ^{1811.}
 train of circumstances necessary to form a true estimate;
 whereas the other party knows nothing. If it were ne-
 cessary to frame a case for the sake of illustrating the pro-
 priety of preventing such transactions, I do not think it
 possible to invent from imagination a stronger case than
 the one now before us;—a transaction entered into be-
 tween the father and the child, helpless and under age,
 whom he had abandoned from her infancy, thrown des-
 titute among strangers, her legitimacy even called in
 question, in a process which neither she nor her husband,
 in the embarrassed state of their circumstances, had the
 means of carrying on; and, in that situation, suffered to
 become a party to an agreement, by which she and her
 husband gave up the estate of Dormont for L. 650.

Upon this part of the question, the defenders appeal to
 the second branch of the Fotheringham case, namely,
 what respected Norman Fotheringham; to which, I think,
 a sufficient answer was stated by Lord Succoth. It was
 said that Norman, although he survived the father, did
 not live till the right vested, because he died before the
 mother. Now, it is clear that the right vested in Norman
 the moment the father died; for this reason, that the mo-
 ther's estate had been given up long before the father's
 death, and the two estates being divided, Norman was
 entitled to go to his elder brother and to say, I call upon
 you to denude and convey in my favour. I have no doubt
 that it was a vested right; not vested by service, but much
 better, because no service was necessary. It arose *ex con-*
tractu, and accordingly the Court found so. The present
 case is quite different. This lady died before her father,
 and she had nothing but the mere chance of succession.

1811. I have just a single observation to make upon the decree-arbitral. On looking at it, I have very great doubts whether it meant, that this lady should discharge more than the right that belonged to herself; for at this time she was very young: she was under age; she was a minor, and the chance was greatly in her favour, that she would survive. Therefore, supposing that the decree-arbitral meant only to convey the right in her, the father got a very good bargain; and, upon considering the decree, I cannot think the parties ever meant to go farther. Those eminent men, whose names appear there, could not be ignorant, that the chance was in favour of the lady having children; and they must also have known, that if she produced a child, and afterwards died before her father, the right under the marriage contract vested in the child from that instant. This was an event which they could not but have had in view; and, therefore, if they ever meant this discharge to be of the nature that is supposed,—a discharge in which the lady not only renounces for herself, but extinguishes the hopes of her issue, is it not natural to suppose, that they would have seen the necessity of making some provision for such a case? I don't see how they could well have made any effectual clause for this purpose; but they would certainly have tried it; they would certainly have attempted to make provision for that special event. But no such thing appears; not a word of any such clause is to be found. The only thing that is discharged is the lady's own right of succession; as to the right of her children, not the slightest syllable glances at it from beginning to end of the deed; and, therefore, the inference that I draw is, that these gentlemen saw the matter exactly in the same light that we do. They thought it highly material, that the lady,

from the involved state of her affairs, should make such a bargain for her own chance, without having the remotest idea that she was to do more; or even supposing that the discharge was ever to be founded upon in the event that has now happened. 1811.

With regard to the case of Stewart, it does not appear to me to be a decision in point at all. The case is not stated distinctly. I have looked into the appeal cases, which are by no means accurate. There is not a single fact in the case clearly explained. They don't even say expressly, whether the son survived the father, and, consequently, whether he came to be vested with the right of succession. But the argument maintained is, that the son had not a vested right, because he had not made up titles by service. Now, did they not know that there could not possibly be a service to a living man? It is clear, therefore, that he must have survived his father; and so the case just comes to be the case of Norman Fotheringham, which was decided upon principles that have been long recognised in the practice of the law of Scotland; going deep into our family settlements, and pervading the whole system of our heritable rights. It only remains, therefore, to give judgment in favour of the pursuers. Something has been said upon the hardship of giving judgment against an infant, to the effect of depriving him of his estate. But this is a plea to which your Lordships can never listen. If there be any hardship, it arises from the law, and must be felt in every case where the righteous heir is restored to the inheritance of his ancestors.

The Court then pronounced an interlocutor, sustaining

1811. the reasons of reduction, in the action against William Thomas Carruthers and his guardian ; and in the action against Mr Routledge, repelling the reasons of reduction, and sustaining his defence.

Against this judgment, a petition was presented for Mr Carruthers and his guardian, and was followed with answers for Mrs Anne Majendie, and her husband, the Right Reverend Dr Majendie, Lord Bishop of Bangor, to whom, by the death of Mr Routledge, the claims under the contract 1735 had devolved.

This petition abounded with very powerful and original views of the subject, and the argument in the answers was also stated with great care and ability. But the present report having already extended to such length, it is not judged necessary to give any abstract of these papers ; especially as the chief grounds of the argument will be found in the doctrines stated from the Bench.

The case was again advised on the 12th May 1812, when the Judges delivered their opinions as follows.

1812.

LORD BALGRAY.

This is certainly a case of great importance, both to the parties and to the law. I have considered it with great attention ; and, I am sure, if I am wrong in the opinion I am going to deliver, I may safely say it is not the fault of the counsel, who have treated the case with the greatest industry and ability. The facts of the case are not much disputed.

The first deed to which your Lordships are called upon 1812. to attend, is the contract of marriage 1708, which, in as far as regards the estate of Dormont, makes a valid entail. Francis Carruthers succeeded to the lands in 1722: he afterwards married in 1731, and in 1735 he executed a post-nuptial contract of marriage, which has given rise to the present question. That is therefore a deed to which your Lordships' attention is to be particularly directed; and we see that the succession is settled, *first*, upon the heirs male of the marriage; *2dly*, Upon the heirs male of Mr Carruthers, in any subsequent marriage; and, *3dly*, Upon the heirs female of the marriage; and if one daughter should happen to be excluded from the succession by heirs male, the said Francis Carruthers binds and obliges him and his heirs, &c. to pay L. 1000 to such daughter. Francis Carruthers made up his titles to the estate in consequence of this contract. In 1736 he was served heir of provision under the contract 1708. Afterwards, in 1740, he made up titles to the estate in fee simple; and upon these titles it has been possessed since that period to the present day. In 1740 Mrs Carruthers gave herself up to a profligate course of behaviour, which led to a process of divorce against her, at the instance of her husband; and during the dependence of this process a daughter was born, who was not acknowledged by Mr Carruthers, but boarded in a remote part of England. In 1758 this daughter married the late Henry Routledge, and then came to this country for the purpose of instituting a process against Mr Francis Carruthers, to compel him to implement the contract of marriage, and most undoubtedly they resorted to the very best legal advice that could be had. I see no ground for supposing, that any undue advantage was taken of her and her husband, who

1812. accompanied her to this country. I think they did the very thing that any prudent person would have done in their circumstances. A great deal is said as to this lady being in a particular situation, and that advantages might have been taken of her in the transaction with her father; but, upon looking into the proof, it is clear that there is nothing to justify a presumption of this sort. She married into a family as good as her own, and Mr Henry Routledge was just as well able to appreciate the importance of his rights under this contract of marriage, as Mr Carruthers or any other person. The process was brought for implement of the contract of marriage; and after it had gone on for some time, a proof was taken as to the legitimacy of this child; in the course of which it was established beyond a doubt, that Mrs Carruthers had abandoned herself to a course of profligate and adulterous conduct, though, at the same time, the law most justly held, that the child must be considered as the legitimate daughter of Mr Carruthers. An agreement was afterwards entered into; and to suppose that persons, who had resorted to the legal advice of eminent lawyers, should have entered into an agreement of such a nature without their knowledge and direction, is absolutely impossible. They then entered into a submission to those very persons who had been consulted in the whole case from the beginning, who knew best what were the rights and interest of the parties; and I am sure, if they had picked any two men from the bar of Scotland, they could not have fixed upon two better qualified to do fair and equal justice between them. They pronounced a decree-arbitral in terms of the agreement. They were well acquainted with the situation of the parties, and they were incapable of taking away rights which, according to their own view of the law of Scotland,


could not be effectually discharged. They never would 1812.
 have lent their names to so dishonourable an act; and
 therefore I think, upon the whole matter, that the trans-
 action was well and properly considered at the time. A
 great deal has been said respecting the conduct of Francis
 Carruthers, and the imprudence of the child. But, with
 respect to Mr Francis Carruthers, I am sure that this
 lady would have been guilty of great folly if she had not
 taken the money that was offered; and if your Lordships
 can suppose that this gentleman was conscious in his own
 mind that she was not his daughter, how can you blame
 him for taking every means in his power to prevent a
 spurious issue from inheriting his estate. After all, what
 was her imprudence? She was married to a young man
 of a family just as good as that of Carruthers of Dor-
 mont; and as he was just setting out in the world, it was
 of the highest importance to them to get a considerable
 sum of money, and it was natural to seek it from his fa-
 ther-in-law. In these circumstances she steps forward,
 protected by her husband, and demands her right under
 the contract of marriage. She accepted of L. 650 imme-
 diately, in place of the L. 1000 payable at a future time;
 or, as it now happens, in place of the whole estate of Dor-
 mont. But what was the situation of matters at the time?
 What was the precise nature of the obligation? According
 to the contract, if the father had sons by any subsequent
 marriage, she had no right to the estate, nor to a single shil-
 ling of the L. 1000, the payment of which was suspended till
 the period of the father's death. Of what value was the
 estate? The rental was only L. 111, clogged with the father's
 liferent, and with all his debts as long as he lived. When
 your Lordships look at all these circumstances, that the

1812. father was not bound to pay till his death, and that he had it in his power to spend the whole estate if he pleased, I confess I cannot see where the impropriety or imprudence of the transaction lies. But be that as it may, a discharge has been granted by this lady and her husband, of their rights under the contract of marriage. Is this discharge sought to be reduced on the head of fraud and circumvention, or of minority and lesion? There is no ground for such allegations; the discharge is as good now as when it was first granted, and your Lordships are to consider the effect of it. This discharge is now pleaded in bar of Mrs Routledge's right. To this there are two answers; one is, that from the words of the discharge, from what is said in the deed itself, it is only a discharge of Mrs Routledge's right at the time, and not of what might afterwards accrue to her; and, 2dly, that *esto* that that question were over, and that she did mean to discharge the full extent of her claim under the contract of marriage, she had no power to do so. As to the first, look at the terms of the discharge itself; look at the summons which was raised, and which concludes for full implement of the contract of marriage; look at the terms of the submission and decree-arbitral; and further, look at the nature of the thing; what was the use of the discharge, unless to put an end to the obligation created by the contract of marriage. If it was merely the simple right in Mrs Routledge at the time, would the deeds have been conceived in these terms? Would the arbiters have given decree in the terms in which they have done? It is impossible to hold, that any thing but a total discharge was meant.

. It is said, that there is nothing mentioned about her

heirs ; but if the right was in her, how could it be discharged in any other terms? If I discharge an heritable bond, do I not discharge for myself, my children and grandchildren? A man acquiring for himself, acquires for his heirs ; and discharging, discharges for his heirs. No conveyancer ever writes a discharge in other terms. She discharges every right that is in her. The conduct of the parties demonstrates this. After the decree-arbitral was pronounced, what is done? Can your Lordships believe it possible, that Mr Carruthers would have taken the steps that he did after the decree, without consulting those great men who pronounced it? And yet, the very next day, he executes a settlement, conveying away the estate of Dormont irrevocably, to a different series of heirs. It is impossible to suppose that it was not a discharge out and out, that was meant. If it had been inserted in the discharge, that she was discharging for her children, she had no power to do so. 1812.

The second question is, whether she had the power to discharge the contract of marriage? This leads to the discussion, what, under a contract of marriage, are the rights of the father and the children? And here I do confess, that I go along with all the views and opinions which are stated in Mr Clerk's admirable paper. I shall not repeat what he has so well said ; but, to take a simple view of the matter, what is a contract of marriage? It is nothing more than a settlement by a father, of his estate upon his children in the first place, and then to any series of heirs he thinks proper ; and the law has attached to this a legal prohibition, that he cannot take away the rights of the children fraudulently or gratui-

1812.  tously. If he does not, then they succeed to him as his heirs. From this there naturally flow certain powers and prohibitions on the part of the father. The law limits his *potestas disponendi*, so that he cannot fraudulently or gratuitously disappoint his children; and, in consequence of these limitations of power, there result certain faculties in the children, which they are entitled to exercise. The first of these is this, that a person, on coming of age, is entitled to call upon his father, to implement the contract *in terminis*. The second is, that if a father shall execute any deed, either fraudulent or gratuitous, they have it in their power to step forward and set it aside. This right is vested in them *proprio jure*. The other and the last right, is the right of succeeding to him; but this is merely a *spes successionis*—a right to take up the succession, if not contravened by the father; and if it is contravened, they may set it aside, subject to the conditions already stated.

It is attempted to be shown, that the children have a *jus crediti* to the estate, or at least to the right of succeeding to the estate. But the object of all rights is things, and this is only putting off the difficulty a little farther; and even if they had such right, I conceive that this would be destructive of their case. If the child has a *jus crediti* to the right of succession, therefore, if a father chuses to depart from his own right, does not that cut off the right of the child to succeed to him? What is the right, that is in the power of the father? Notwithstanding of the contract, the father has vested in him the power of giving implement to the son; and, on the other, hand the son has the power of receiving implement from the father.

All the cases are cases where the rights of the parties have been separately considered. But the question here is, what is it in the power of both parties conjointly to do? Their right is just this, that the father has the power of giving, and the presumptive heir has the power of receiving implement. It is upon that principle, that your Lordships are to consider this case. But independent of all that, there are two things that I never can get the better of. In the first place, it is admitted on all hands, that the father has it in his power to implement the contract, and that, after he implements out and out the obligation to the presumptive heir, the contract is fulfilled, and at an end; and also, that at the moment when it comes into the person of the heir, it becomes a fee simple in his person; he may dispose of it in any manner that he pleases. That seems to be decisive of the present question; for, if the father has the power of giving, and the son that of receiving, what other party has a right to say upon what terms this shall be done? If there is any thing in the argument, it ought to set aside the full implement altogether. Suppose the father implements in the person of the presumptive heir, I ask, is not the alienation of the father to him gratuitous? Is it not a gratuitous alienation? And, if it is so, upon what principle is it, that the second son should not have the power of setting it aside? Why should not he have his chance of the lottery ticket, such as it is? In questions of this kind; where our predecessors have fixed the law by express decisions, I do not think myself at liberty to depart from it. This Court is bound by precedents. In the cases of *Stewart*, *Fotheringham*, and others, it is impossible to deny, that there are direct precedents in favour of the plea

1812.

1812. maintained by the father. In the case of Stewart, a difficulty has been made, as to whether the son survived the father. But I am clear, that the son predeceased the father. At any rate, I don't care whether he did so or not, because he did not make up titles by service; and as to rights that require a service, if the heir does not make up titles, but drops, in the mean time, his deeds are just as ineffectual as they would have been before his father's death. The case of Fotheringham involved the very point here at issue. With regard to the contract 1708, it is certainly prescribed, but it was not prescribed in 1736, and Francis Carruthers made up his titles under it at that period, and it enters very deeply into the settlement then made.

LORD HERMAND.

(SHORT NOTES, FURNISHED BY HIS LORDSHIP.)

Struck with elaborate petition, but every doubt removed by answers.—Chief question of difficulty.

Meaning of decree-arbitral by Lockhart and Pitfour.

If they decided, or meant to decide, not only on pecuniary provision, but on right of succession of Elizabeth Carruthers, nay on right of her descendants, should anxiously reconsider an opinion, not to be compared or mentioned in one day, or in one year, with that of those *antistites juris*,—the ornament, the pride of their profession.

At last advising I was engaged in the Outer-House, but came in at the conclusion of the speech of President Blair,

who declared, that he did not conceive that the arbiters meant to decide on any thing but the money provisions. This surprised me at the time, but I soon came to concur with him. 1812.

For, consider the use of this decree-arbitral.—A mere piece of formality.—a decree *conform*.

Elizabeth and her husband in indigent circumstances—Debtors to James Ewart (who I supposed a money-lender, though I never heard of him before.)

Execute a contract (Ans. p. 14.) with Carruthers.

Claims of Elizabeth or her heirs (Ans. p. 4. *vid.*)

Oct. 26,
1759.

Suppose she had already a child existing, or a child *in utero*.

Could this contract, never ratified by Mrs Routledge, have been pleaded against such child?

But I go farther—Contract, p. 15. Ans. *vid.*

The claims of future children—Were not as heirs or representatives of E. Carruthers, but under marriage-contract of her parents:

Follows submission, p. 16—Narrates the contract—Subject *vid.*—The claims of Elizabeth Carruthers and her husband, without a word of their descendants. Nov. 30,
1759.

In *eight* days decree-arbitral—Too short a space for examining the progress, or studying those deep principles, on which a decision, meant to regulate whole course of succession, must have been founded—But no words having that effect. Dec. 7,
1759.

1. Sum awarded, p. 17. *vid.*

2. Obligation to discharge, *ibid. vid.*—Difficult to carry this to succession of Eliz. Carruthers.

To carry it to that of her issue—

Impossible.

1812. It orders L. 650 to be paid in satisfaction to said Eliz. Carruthers and her husband, and James Ewart in their right, of all right of succession *they*, or any of *them*, have in the estate of Dormont.

Not of what belonged to their descendants.

Same day Discharge *totidem verbis* with decret-arbital.

In this simple view, decisions accumulated with such industry require not particular discussion. *Esto*, heir of marriage may discharge, not only for himself, but for his issue, so as to exclude their hopes.

Nothing to the purpose—If supposed power has not been exercised—But no case of such discharge sustained, unless heir discharging survived.

I. Case of Brugh, Ans. p. 67.

Stated from cases drawn by English attornies—of no authority.

And, when understood, unavailable to the petitioner.

Had not son survived the father, which he did not.

1. No ignorance of our law—Could explain omission of such a circumstance as his pretended survivance.

2. No meaning in the observation, repeated *ad nauseam* in the case, p. 72, that Robert did not serve—Had he predeceased his father.

3. Who would have been above 100, had he survived, which is next to impossible, and contrary (p. 73.) to legal presumption.

Dates particularly stated.	II. Trail,	p. 74.	} In all of these the heir survived.
	Moncrieff,	p. 79.	
	Allardyce,	80.	
	Threipland,	81.	
	Powrie	82.	

And who doubts the heir may bargain for himself? 1812.

Or homologate a former transaction? 

This the *ratio* in several of the cases.

In the last, Lord Newton lays stress of the cause on that circumstance, p. 84, 86.

Effect of tailzie 1708, p. 87.

Need not dissect that deed.

For it is cut off by negative prescription, p. 94, and by positive—both which had expired before the transaction 1759.

II. Case of Welsh explained, Ans. p. 37.

Like that of Durham—There were two titles—And possession on either sufficient.

III. Obligation of marriage-contract 1735, p. 99.

Francis Carruthers by his subscription, and William as his representative, were bound to implement it.

IV. *Legitimacy.*

The most attractive view of the case.

Giving it the air of a novel romance.

We may suspect that Elizabeth was not the child of Dormont.

But *pater est quem nuptiæ demonstrant.*

Where no impossibility of *concubitus.*

By passing invisible line of the border, or otherwise.

LORD SUCCOTH.

When the cause was last before us there were three points pleaded.

1812. The question of the *legitimacy* seems to have been given up, but the subsistence and effect of the entail in the contract of marriage 1708 is still argued, although the validity of the discharge is treated as the principal question. In delivering my opinion, I shall confine myself chiefly to this last point, which is certainly a most important and a very nice question of law. After I had given my opinion formerly upon that question, I had the benefit of hearing the very able and luminous opinion given by the late President, by which my own opinion was fully confirmed. Notwithstanding all the ingenuity displayed in the petition—notwithstanding that, I fairly confess, that, upon reading the petition, at first I was much inclined to think that there might be grounds for an alteration of the judgment, yet, upon carefully reviewing the whole argument, I have now come to be of the same opinion which I formed and delivered at last advising. Upon the question of the discharge, to which I shall chiefly speak, I think it unnecessary to go into certain matters, which are rather of a preliminary nature, and do not enter into the essence of the case. One of these is, whether the discharge was equal or unequal; whether it was the one or the other does not much affect the real merits of the question; nor, whether Elizabeth Carruthers did or could grant an effectual discharge, not only for herself, but for all her descendants, whether they represented her or not, which is, what she is supposed to have done by the contract and submission, and decree-arbitral following upon it. If the equality of this transaction is at all to enter into our consideration, it does appear to me, that it was a most unequal one indeed, if the meaning of the parties was, that for L. 650 Elizabeth Carruthers was to renounce

for her and her descendants, who do not represent her, for 1812.
ever, the right to this estate, whether she survived her father }
or not. If, on the other hand, all that was meant by the
parties was, that she was to discharge her chance of out-
living her father, and to succeeding to the estate, L.650
was a fair equivalent. The real question is, whether
Elizabeth Carruthers was in a situation, in point of right,
that enabled her, in a legal view, to grant an effectual
discharge of her right or claim to the estate, which, al-
though she should not survive her father, would be bind-
ing upon the person who should be heir of the marriage
at the time the succession opened by the death of the fa-
ther ; and whether such person represented her or not. In
considering this question, it must be admitted, that the
precise character of an heir of a marriage is somewhat dif-
ficult to define. That this is the case is evident, from the
different accounts of it that are given by our institutional
writers. Some of them describe the heir presumptive
as a creditor, but *submodo* or *quodammodo* ; others say,
that he is so far an heir and so far a creditor. It
appears to me, that he partakes partly of the charac-
ter of an heir, and partly of the character of a credi-
tor—a creditor under a contract—and an heir expect-
ant, having a *spes successionis* of succeeding at the death
of his father ; and your Lordships have seen, from va-
rious cases, that the powers of the father are very great
indeed, even where the estate is settled upon the heir of
the marriage. In the late case of Sir William Cunningham,
the Court were of opinion, that a father had a right to
sell the estate, not from any necessity, but merely be-
cause he took the whim or fancy of doing it, and the heir
was not able to prevail on your Lordships to prevent the

1812. father from selling; so that if the heir of a marriage is a creditor, his rights as such are extremely slight indeed. The heir's right to the estate remains superseded till the father's death. It is no matter what name this right shall get, whether *spes successionis* or *jus crediti*. It is no eventual right depending on the heir's outliving the father. It is clearly a *contingent* right, which is uncertain till the father's death. In that situation there cannot be a question that the heir of a marriage may discharge this right, in so far as it is personal to himself; he may sell it—he may dispose of his own chance of succession. It is a chance personal to himself, and nobody has any right to interfere, although he should make ever so foolish a bargain; but he merely disposes of his own chance. The full right not being vested in him, he cannot transact or convey it to the prejudice of the person who shall be heir when the succession opens at the death of the father. It is that person who is the real creditor under the contract of marriage. It is the heir of the marriage at the time the succession opens who alone has the full right in him. He may do what he pleases. The other persons substituted in the contract of marriage are heirs not in *obligatione* but in *destinatione* merely; and therefore when he survives the father, he may sell the estate, or ratify any discharge of his right to it, which he may have previously granted; and even if he does nothing, his silence will be held in law as a virtual ratification of the previous discharge.

Holding, that in every case the heir, under a marriage contract, has but an uncertain and eventual right until the death of the father, it appears to me, that the chance of Elizabeth Carruthers was more than usually contingent.

By the contract 1735, the estate was settled upon the heirs male of the marriage; whom failing, the heirs male of any subsequent marriage; and then only on the heirs female of the first marriage. Elizabeth Carruthers was this heir female; and, as the first marriage had been dissolved by a divorce, it was impossible that there could exist an heir male of that marriage, so as to cut her out. But Mr Carruthers might have married a second wife, and there might have been an heir male of that marriage; and if that had happened, such heir male would have come before her; so that her chance was extremely uncertain and contingent. It was in that situation, and in such an uncertain state of her rights, that she was prevailed upon to enter into a transaction, by which it is alleged, that she gave up not only her own right to the estate under the contract of marriage, but also, in the event of her predeceasing her father, that of her child, who should be the heir at the time the succession opened, whether such child should represent her or not. All that was given was L.650. The sum was not too much for her own individual chance; and it appeared to the late Lord President, from the whole construction of the deeds, that the arbiters understood this to be the nature of the agreement, which they were to sanction by their decree-arbitral; and certainly it was a most reasonable sum in that view to give. I don't see sufficient evidence upon the face of the deeds, that they had only in view to fix what was an adequate consideration for Mrs Elizabeth Carruthers' individual chance of the estate; but, knowing them to be men of great talents, I think they must have had strong suspicions, that this discharge would not be effectual if Mrs Elizabeth Carruthers did not survive her father. But what


1812. could the arbiters have done to get the better of this difficulty in point of law?

In the papers there is a good deal of discussion, whether the *jus crediti* vests without a service. It is a pretty nice question, with regard to which the decisions differ a good deal,—although there is some reason for holding, especially from the late case of Christie, (21st January 1806,) a decision not noticed in the papers, that it does not vest even to the effect of transmitting without a service. But it is quite unnecessary for me to enter into the point here, because this is not a question arising upon the death of the father. It is a question with regard to the nature of the right of the heir of the marriage during the father's life.

Another question is much agitated, arising from a supposed distinction between a discharge and a conveyance. It is said that the heir of a marriage, during his father's life, may transact or discharge his right to the estate under the contract of marriage, although he cannot effectually convey such right. But I am at a loss to see upon what grounds of law this distinction is founded. If the heir of the marriage has a vested right in him, which it is said he has, it appears to me, that he may do the one as well as the other. He may convey as well as transact. In every point of view, there is much more danger to be apprehended from transacting with the father than from a conveyance to a stranger. Any transaction between the heir of a marriage and his father must be most unequal indeed. The son cannot be upon an equal footing with the father; and therefore it is more necessary, that the law should guard against transactions between father and son, than

that it should prevent the son from conveying his right to the estate to third parties. The petitioner has tried to make out this distinction, from a desire to get the better of the case of M'Conochie against Greenlees; but he has by no means succeeded in his attempt. No such distinction is to be found in the papers, in that case, which I have perused. There the counsel, on the one side, maintained generally, that the heir of a marriage has power to convey, transact, or discharge, whether he survives the father or not; and, on the other hand, the opposite counsel just maintained the contrary doctrine as broadly. The report clearly shews, that this was the nature of the argument, both from the title of the decision, and from a passage in which the reporter states, that the merits of the question depended upon this, Whether Mrs M'Conochie, upon the dissolution of her father's first marriage, became a proper creditor to him in the provisions stipulated by the marriage contract; or whether her interest was merely an expectancy of succession, contingent on her outliving her father; in which case, the conveyance in favour of her husband would be vacated by her predecease. The Court held her interest to be of the last description; and therefore the assignment of it to her husband was found not effectual, because she predeceased her father. Two or three cases are quoted in the petition for William MacConochie, to shew that discharges of an heir's interest under a contract of marriage were effectual, although the heir predeceased his father. But the answer to these cases, made by the counsel on the other side, was, that in point of fact, in all of these, the heir making the transaction outlived the father; and from one or two passages

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1812. of the answers to that petition, drawn by Mr David Rae,  it is distinctly shewn to have been the case, by an accurate statement of the dates, which he must have taken from the papers in these former cases, particularly that of Sinclair of Southdun, which is reported among the select decisions of Lord Kaimes; but the report is so inaccurate, as to dates, that it cannot be discovered from it, whether the daughter, who discharged her rights to the conquest for a sum of money, survived her father or not. But from the dates, as stated by Mr Rae, it is quite clear, that both the daughters outlived their father; and the same is there shewn to be the fact, in the case of Allardice. These cases, therefore, operate in favour of the respondent, because it has been shewn that in them the child survived the father, and so made the discharge granted by the former good.

I am aware, that there are circumstances, in which the person who happens to be heir of the marriage when the succession opens, may be disappointed; but that can only happen in the case of the succession having been set forward in the person of the heir of the marriage, and an alteration of the destination then made. I think it is now clearly established, that the father may set forward the succession, by disponing, in his own lifetime, the estate to the heir of the marriage contract. But that is a very different case from the present. When he does so, he gives full implement of the contract. When the estate is once vested in the heir of the marriage, the contract itself is fulfilled, and at an end. It may happen that, in the deed in which the father disposes the estate to the

heir of the marriage, he may alter the destination in the marriage contract; or, after the son or heir of the marriage gets it from the father, the son may alter the destination. There is nothing to hinder him from doing so; because, when there is no entail, he holds the estate in fee simple. But is there in this any thing contrary to the principles that I have stated? Certainly not. He may next day alter the destination, so as to bring it back to what it was originally; and if he chuses not to alter it, the heir who would otherwise have been the heir under the contract of marriage at the time the succession opened, may be cut out of the estate. But, is that any thing to the purpose? If he does not alter, then it is held that the change of the destination is his act. The setting forward the succession is attended with most important effects to the heir; and there is not much danger of this being often done, so as to give full implement of the contract of marriage during the father's life,—I mean, a fair implement of the contract; for I can conceive such a case of contrivance, and I may say fraud, between the father and the son, that your Lordships might see grounds for setting aside a deed setting forward the succession in the person of the heir of the marriage, if this was challenged by that person, who, had it not been for this contrivance, would have been the heir of the marriage at the time the succession opened. But, in general, where no such circumstances exist, the setting forward the succession is held as full implement of the contract of marriage, so that he cannot be afterwards disappointed of it; which is attended with most important consequences, not only to himself, but to others claiming in his right, either as heirs or as creditors.

1812.

This cannot be better exemplified than by the case of Trail. In that case, the father, when he disposed the estate to his eldest son, the heir of the marriage, reserved his own liferent; and in the disposition by which this was done, the father altered the destination in the marriage contract, by calling David, his second son, immediately after his eldest son Patrick, and the heirs male of his body; thus cutting out the daughter of his eldest son. But was there any thing to have prevented the eldest son Patrick, during the three years that he survived his father, and had right to the fee of the estate, to have altered the destination, and preferred the heirs female of his own body to the heirs male called by the disposition just mentioned? Nothing whatever. He might have done so, but he died without doing it, either from carelessness or some other cause, no matter what. That the fee was completely vested in him, will appear from the judgments of this Court, which are quoted on p. 46 of the petition for William Carruthers, now before us. By these, the widow and daughters of Patrick were found entitled to an aliment out of the estate, although the father, who had reserved his own liferent, opposed this; and at Patrick's death, his widow was found entitled to a terce, expressly on the ground, that the fee was vested in Patrick. That being the case, the setting forward the succession, by disposing the fee to the heir of the marriage, completely vests the fee in the person of the heir; and it is of no consequence in the argument, whether any of the subsequent heirs may be disappointed or not, they being *in destinatione*, not *in obligatione*.


The case of Fotheringham, also, was a case where there


was implement of the contract by setting forward the suc- 1812.
cession, and was similar, in that respect, to the case of Trail. In the case of Fotheringham, it is certainly true, that the discharge by Norman was found effectual; and I hold, that the case, in which I was one of the counsel, was well decided. But there was no doubt that, in that case, there was a fair implement of the contract, viz. by conveying the estate of Balfour to Alexander, the second son. The difference of opinion on the Bench, upon that occasion, arose from the peculiar nature of a devolving clause that occurred there, but which does not occur here. One set of Judges thought that the clause could only operate once; and the other, that it must operate so long as there was a younger son of the marriage existing. By the conveyance of the estate to Alexander, the second son, the estate was as much vested in Alexander as if his mother had not been dead. In these circumstances, Alexander entered into a transaction with his immediate younger brother Norman, by which he purchased up any claim which Norman might suppose he had to the estate of Balfour, in virtue of the clause of devolution. Norman survived his father, by which event Alexander succeeded to Powrie, and consequently Norman came thereby to be vested in the full right to Balfour under the contract, and in virtue of the clause of devolution, if not at an end. The *jus superveniens* accresced to the previous discharge; and the Court held the discharge, granted by Norman before his father's death, as thereby rendered valid and complete. It was the death of the father, and not of the mother, which was material. The mother had vested her estate in Alexander equally as if he had succeeded to it at her death. She had implemented the contract by setting for-

1812. ward the estate; and, after having done so, she was totally out of the question. No matter whether Alexander survived her or not; it was the death of the father that was alone material. By his death, the estate of Powrie came also to be vested in Alexander, who had previously got the estate of Balfour; and then it was that the clause of devolution, if it was to be at all effectual, required him to denude in favour of Norman. When this took place, Norman, having come into the full right of the estate under the devolving clause, might have called upon his brother Alexander to denude. He did not do so, because he had formerly discharged his right, and thus virtually ratified the discharge; and in that way the transaction became complete.

Whether, if Mr Francis Carruthers had disposed the fee of this estate to his daughter Elizabeth, he might have entered into this transaction with effect, is not the question before us. She would, in that case, have had the substantial right to the estate vested in her person, independent of her father; and as she could not have been afterwards deprived of the fee of this estate, upon the credit of which she might have borrowed money, and which her creditors might have attached, she would have been much less dependent upon her father, and perhaps might have entered into a transaction with him for the right to the estate, which might have been effectual, although she might have predeceased. But it is unnecessary to give a decided opinion upon this, as it is very different from the question now before the Court.

The case of Stewart does throw the greatest difficulty

upon this case, and it is the only difficulty that I now have. 1812.
If I saw clear evidence, that, in that case, the son really  predeceased the father, I might perhaps be inclined to hold, that that decision, though a single precedent, would be binding upon us; although, as there is no argument in the appeal case upon this material fact, there may be room to doubt, whether this case of Stewart can be considered as a decision upon the point of law we are now considering, since it was not at all argued,—no matter from what cause this omission arose. But there is no sufficient evidence that the son did predecease; I rather think the son survived. The statements are contradictory; but, from the whole circumstances, it is probable that the son did survive. A great deal of the argument is founded on the fact, of Robert having made up a title, by service to his father, all which would have been downright nonsense, if he had not survived the father. In the petition a letter is founded upon on this subject, as a piece of new evidence, but I cannot give much weight to that letter. It is written by one Smith, after the cause was begun. It is extremely vague, and is certainly not legal evidence. Another circumstance is stated, for the first time, upon the authority of a passage from a paper of Lord Tinwald, in a subsequent cause, where it is alleged, that Robert died in his father's lifetime. The learned counsel certainly states that to be the fact, and I believe it was his understanding upon the subject; but it is the mere statement of a counsel, and therefore no evidence. The contrary is just as clearly stated by Lord Craigie, in the case of Fotheringham, and no answer is made to it by the late Lord Newton, except that it did not appear from the papers in Stewart's case how the fact really stood. This is also

1812.  worthy of notice, that in as far as regards the principal part of the lands, there was implement of the contract of marriage. The lands of Burgh were, by the deed of the father, conveyed to Robert, the heir of the marriage, and then there was a transaction between Robert and his younger brother. There could be no objection to the transaction, in so far as related to the lands thus set forward into the person of Robert, because the contract of marriage *quoad* these was fully implemented and exhausted. But there are certain other lands that were not set forward, and Robert also transacted with regard to them.

The contract of marriage 1708, if not prescribed, was an effectual entail at least to the lands of Dormont, which belonged to the husband, but I doubt whether it contained a valid entail as to the lands of Winterhopehead which belonged to Mary Bell the wife, there being only a general reference to the limiting clauses in a prior part of the deed, and even that reference not very distinct. But it is unnecessary to go much into this, as it is clear that the contract itself is prescribed. It has fallen both under the positive and the negative prescription. I did not clearly see at the last advising whether the positive applied, and my argument was chiefly directed to the negative; but I now clearly think it has fallen under both the positive and the negative prescription. No title was made up under the contract 1708, which remained a latent deed. The destination in it, which was to heirs male, was altered by Francis Carruthers' contract of marriage in 1735.

In 1736, Francis took a charter to himself, his heirs and assignees, and, in 1740, he completed unlimited titles

to the whole lands. There was afterwards another unlimited title in the 1759, by which, after the transaction with his daughter, Francis settled the estate, failing heirs male of his own body, upon his brother William and the heirs male of his body; but even this destination was different from that in the contract 1708. Besides, did he give the estate to these heirs under an entail? No such thing. The estate was disposed in fee simple to them; and is it possible to say, that because Francis called in that deed a series of heirs somewhat similar to those called in the contract 1708, there was any thing done thereby to prevent the operation of the positive prescription upon the unlimited title previously made up in 1736. It is true that he expedite a service as heir of provision under the contract 1708. But why? Because it was the only way by which he could make up a title to the lands of Winterhopehead, which lands however, as already stated, could not be held as entailed, even if the contract 1708 was not prescribed. But supposing the entail valid *quoad* these lands, did Francis acknowledge that entail by expediting this service? No such thing; for he immediately after made up a title, in fee simple, by taking the charter 1736 to heirs and assignees.

The estate has been held on three unlimited titles since.

The positive prescription, therefore, has run upon the charter 1736, and even on the disposition 1759.

It is of no consequence that Francis died in 1773, for his brother William continued to possess the estate on unlimited titles; and it is of no importance whether he

1812. was the heir who would have succeeded by the contract 1708, for he took the estate under the disposition 1759, executed by Francis.

William was served heir male of provision to his brother Francis, under the deed 1759, and, therefore, he became bound to fulfil his acts and deeds, one of which was to make good the provisions of his contract of marriage 1735.

If Francis could not have pleaded the entail 1708 against his own contract of marriage, neither could William who represented him. Of course the present defender, his son, is equally debarred from challenging.

LORD GILLIES.

It is not necessary to enter minutely into the history of the case, which has already been generally stated, and cannot affect the merits, since it is of importance only, in so far as regards the equality or inequality of the transaction. The transaction is not challenged as unequal or unjust, but as having been entered into by one who had no power. It is certainly out of place for us to consider, whether a transaction, challenged upon this legal ground, was in itself fair or unfair. But I am afraid it is impossible for Judges in such cases to avoid allowing such circumstances to enter to a certain extent into their consideration ; nor can I help thinking that this has happened in the present case, and, therefore, it may be proper to say a few words upon the history, in so far as it affects the fairness of the transaction. In 1708, an effectual entail

was made. Under that entail Mrs Routledge never could have succeeded. In 1730, Mr Carruthers married Miss Maxwell, and, in 1735, he executed a post-nuptial contract, by which, disregarding the entail, he settles the estate on his heirs male of that marriage; whom failing, on the heirs male of any subsequent marriage; and, lastly, on the heirs female of the first marriage. Then he makes up his titles on the contract 1708, though he disregarded the entail contained in it. The estate in point of form was vested in him, in fee simple, though he was bound by the entail. In 1740, he brought the process of divorce, in which he was successful, and nothing more was heard of the matter until the year 1759, when a child appears, declaring herself to be the daughter of Mr Carruthers, and brings an action which ends in the submission and decree-arbitral. The object of Mrs Routledge was to enforce, in all its parts, the contract against her father. What were her claims? Her claims were the estate of Dormont if there was no male issue, or L.1000; she had no immediate claim—she could not possibly have an immediate claim to the estate of Dormont, because her father was alive, and if he had heirs of any subsequent marriage they would succeed; neither could she have any immediate claim to the L.1000, because it was only payable, in the event of there being sons of a second marriage; and at that time her father had not entered into a second marriage. Now, under these circumstances, she entered into a contract, and the arbiters gave effect to it, by finding, that she was to receive payment of a certain sum, and to grant a discharge, full and ample, of all her claims under the marriage contract. Sure I am, that in this there seems to me nothing unfair; for if, on the one hand, she

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1812. had only L. 1000 subject to the conditions of death, or male children on the part of her father, L. 650 was a sum much more valuable than L. 1000 depending upon these contingencies; on the other hand, she had the eventual right to the estate, and I pray your Lordships to observe, that, besides the uncertainty of her ever succeeding, there lay other objections to the claim, which appear to me utterly insuperable, and which rendered her claim of no value whatever. Mr Carruthers, in the eye of the law, was no doubt her father, but he believed that she was not his child. She was indeed a child forced upon him—his child by law but not by nature; nor was she the child of his affections; and a father so situated, might have fairly told such a child, ‘If I am not at liberty to dispose of the estate to those whom I believe to be my natural heirs, I will give it away during my lifetime: I will sell it, and purchase an annuity with the price: I will be at pains to preserve the estate for those who have a natural right to it; but I will allow myself every indulgence, and be put to no inconvenience for you, for whom I have no natural predilection.’

There is another consideration to be attended to. It has been justly observed, that the entail 1708 is now prescribed; but, certainly, prescription had not run against it in the year 1759, and Mr Carruthers might then have said, ‘I will make up titles under this entail, or contrive to take such other measures as will give effect to it, and then your claim is good for nothing.’ It is said, that this was overlooked, and that the arbiters did not attend to the contract 1708. If that were true, it would follow, that Mr Carruthers was taken advantage of. But I don’t

believe that the contract was overlooked. I believe it 1812:
 was fully in the view of the arbiters, that they took every {
 circumstance into their consideration, and that they
 thought the contract made by their advice was a fair, just,
 and equal arrangement. She relinquishing for herself
 and her heirs, all claim under the contract of marriage,
 and he paying down the money. It is said, that this was
 merely an agreement between the parties, to which the
 arbiters gave effect in point of form. But, I conceive it
 to be contrary to the duty of any advocate at this bar, to
 sanction an unfair contract between any parties. I have
 been taught to regard the memory of the arbiters in this
 matter, in a very different light. It is impossible to be-
 lieve, that they could ever have sanctioned such a trans-
 action. What they understood to be the effect of it
 is clear. In so far as regards the estate of Dormont
 they left Mr Carruthers at liberty to dispose of it as he
 thought proper, and accordingly we find them imme-
 diately afterwards advising him to dispose of it to his
 own heirs. If they had doubted as to the validity of the
 discharge, is it possible that they would have given such
 advice to their clients? If they had doubted, they would
 have told Mr Carruthers, that in order to make matters
 sure, he should recur to the former entail, and prevent
 any claim on the part of this lady. They however gave
 no such advice, and the only inference from that is, that
 they thought this discharge effectual, in so far as re-
 garded the estate of Dormont and the L.1000. But al-
 though these were the views of the arbiters as to the fair-
 ness and justness of the transaction, yet, as I have already
 said, it is not challenged upon any of these grounds. It
 is challenged upon grounds purely legal. The discharge

1812. as to this is now effectual, and all that we have any concern with, is its legal effect. This gives rise to a question of law, which has nothing to do with the equality or inequality of the transaction. This question, though an important one, does appear to me to be attended with little difficulty. The general principles of our law encourage commerce, and favour the free use of every subject, and of every patrimonial right and interest of every kind. Whatever fetters property, whatever fetters any one in the use of property, or of any sort of patrimonial right or subject, is discouraged by our law; and wherever I am told, that a patrimonial right belongs to any individual, I hold that it is in his power to dispose of it; to discharge it, or to transact it in any way that he thinks proper, unless he is prevented by any existing law, statute, or train of decisions, rendering it illegal at common law. The patrimonial right here, is the *jus crediti spes successionis*, or whatever else it may be called. It is the right of an heir, under a contract of marriage, to succeed to the estate which forms the subject of it.

Is there any thing in our law which says that this right shall not be the subject of compromise? I have never heard of such a law. I conceive that a person holding a *jus crediti* is entitled to dispose of it in any way that he thinks proper. His right to dispose of it is just as full and ample in his person, as his right to dispose of any estate of which he is the absolute proprietor. He can only sell it *tantum et tale* as it stands, subject to the condition under which he himself holds it, that he shall survive his father. That condition accompanies the sale, and if he can sell it to a third party, subject to that con-



dition, can he not grant a discharge to the father? 1812. If he does grant a discharge to the father, the condition vanishes, because it is a condition in favour of the father. The father is entitled to wave the condition, and no other party can wave it. But the father's consent being given to the son's deed, the condition flies off. This condition is that which alone stands in the way of the son's absolute right; and this proposition becomes perfectly clear, when it is admitted that the father may anticipate the succession. What does he do then? He waves this condition which he is entitled to do, and when the son discharges the father, the condition is at an end. The father is the creditor in the obligation, and the condition which would have rendered the conveyance ineffectual in favour of any third party, does not stand in the way of a discharge to him. By his accepting of the discharge, the transaction receives complete effect. That the father can grant specific implement to the son, is admitted on all hands, and was the clear opinion of the late Lord President of this Court, who had a very different view from me of the result of this case. But biassed as I am sure I am in favour of any opinion of his, still I am bound to form and to be guided by my own opinion, and I can have no hesitation in differing from him, where I do so upon clear grounds. But even he stated distinctly, that if the father conveyed the estate during his own life, to the heir of the marriage, the contract was thus extinguished, and at an end. Now, what did or could this proposition rest upon but this, that the condition of the son's survivance was a condition that the father himself was entitled to renounce. He renouncing this condition, the estate becomes the absolute property of the heir of the marriage, and the contract is at an end. And why

1812. but because these parties agreed to do so. In what respect does this differ from the discharge of a claim granted by the son to the father? And what does the right of the father become, but the absolute right to the estate? If a conveyance to a third party is good, but for that condition, a conveyance to the father is good, notwithstanding the condition. How can this be true, but because the father waves his right, and puts an end to the condition the moment he is a party to the transaction. It is said that the contract is not implemented in favour of the subsequent heirs, but it is clear, that no implement during the father's life to the eldest son would be implement to them. This would be no answer to those, if there be any such, who maintain that specific implement in the father's life is insufficient; it is sufficient in my view of the question. The case may be put in this way—whether the provision of a marriage contract is not an obligation in which the father is the debtor, and the eldest son the sole creditor. That this is the case, I think clearly results from the proposition which is admitted on all hands, viz. that implement by the father to the son puts an end to the contract. But how could implement to one who is not the full creditor extinguish the obligation? If the son is not the full creditor, could implement to him put an end to the contract? I confess I am not able to follow or comprehend the contrary doctrine. When it is said that the contract will be extinguished by specific implement to the son, can I infer any thing from this, but that the son is the full creditor in the obligation? And if this be the case, then it follows, that the son's discharge upon what he chuses to hold sufficient implement must be effectual; he is the full creditor, and the discharge has, and must have the same effect as a discharge upon specific im-

plement ; for who is entitled to judge of what is sufficient
implement but the creditor in the obligation ? 1812.

It is said, that this discharge was only granted by the lady herself, and does not affect the claims of her heirs ; but if this be so, the nature of the transaction was totally mistaken by the learned arbiters ; and the transaction, as to Mr Carruthers, was most unjust and iniquitous. If all that he obtained was a surrender of her personal claim merely, and not that of the other heirs, he met with gross injustice. I am clear, however, that this was not the meaning of the arbiters. I should be glad to know where there is any evidence to shew that it was. And here I must refer to the able statements contained in the petition ; for it appears to me incomprehensible, that a creditor discharging the obligation does not extinguish it. She was full creditor—sole creditor, and by her discharge the claim is at an end. Is not the debtor liberated, and the obligation extinguished by such discharge ? The discharge did not convey the estate, but it discharged the only claim that lay against it in the person of Mr Carruthers, and left him at liberty to convey it to whom he thought proper. The discharge is not founded on as a conveyance of the estate, but as a discharge of the only burden under which he held it. She discharges what she could take. And what could she take ? She could take the whole estate of Dormont if the father chose to give it to her. But the pursuer seems to argue, that the heir had no *jus crediti*, but only a *spes successionis*, which all the subsequent heirs had in like manner ; and, therefore, that he cannot deprive them of that right. But, if he cannot effectually discharge it, how should the father have it in

1812. his power to confirm and give full effect to it during his life? For if the son cannot discharge it, so neither can the father give effect to it during his life. It is plain, that there must be something more than a *spes successionis*. The heir is just the proprietor of the estate, subject to the condition that he shall survive his father. This right he may sell; and as he may sell he may effectually discharge. It is said, that if there is a *jus crediti* in the heir, there is also a *jus crediti* in the younger children. But this is against the admitted rule of law, that the father may convert the *jus crediti* of the heir into an absolute right of property; in consequence of which their *spes successionis* is entirely at an end. It is said, that a conveyance would not be good if granted by the son during his father's life. But this is entirely a mistake. It is not in consequence of the right of the subsequent heirs to challenge such a conveyance, that it would be ineffectual, because the condition never takes effect, under which the estate was to become his property. The conveyance, during the father's life, is utterly ineffectual, if the child who grants it predeceases the father, but not otherwise. Suppose Mrs Routledge had never had a child, but had been the only heir. She conveys her right; but predeceasing her father the conveyance falls to the ground, not in consequence of any right supposed to belong to the subsequent heirs of the marriage, but because the heir could only convey what he had a right to; and he had only a right to succeed in case of his surviving the father. The title to a third party would be effectual if the father had joined in the conveyance; and it is only ineffectual because it was contrary to the condition under which the heir holds the estate. The decisions strongly confirm

this view of the matter. The case of Stewart is exactly 1812. in point, unless upon the supposition that the son outlived the father. It appears to me, from the evidence afforded by the appeal cases, and the arguments of the parties, that the father survived the son; and I cannot disregard the other circumstance founded on by the petitioner, viz. the averment made in the case of Elshieshiels, that the father did survive. It is said, that this is of no avail, more than the opposite allegation which is made in the case of Fotheringham. But the two things are very different. The assertion in the case of Elshieshiels, was made at the distance of only eight years after the fact; whereas, in the case of Powrie, it was sixty years. Suppose a question had occurred here, as to which of the parties survived, as in the Fotheringham case, could there be any doubt of the fact? Could it be held that any respectable counsel would have given an inaccurate statement upon that subject? The fact must have been well known to the Judges in the case of Elshieshiels. The other cases strongly support the general doctrine; and, upon the whole, I am most clearly for sustaining the defences.

LORD CRAIG.

(FROM NOTES FURNISHED BY HIS LORDSHIP.)

Difficult and doubtful case. Spoke to it at large when formerly before the Court. Will not again resume it at length, after so much has been said.

Doubt if there is ground sufficient for altering the interlocutor.

1812.

With regard to the decree-arbitral, I have no idea that the arbiters had the matter of succession in their view. They only pointed out the manner in which the agreement was to be carried into execution.


As to the entail 1708, I shall not enter into any discussion with regard to it ; because I think it has incurred the negative prescription.

The great difficulty in the cause appears to me to be with regard to the effect of the discharge. Upon this I remain of the opinion I originally formed. I think that Elizabeth Carruthers was not in a situation to bind herself by such a deed ; and that her representatives are entitled to reduce it. She was a minor when she granted it ; without a friend, and deserted by her father ; she had only a right of succession, or expectancy, attended with uncertainty ; she had only an eventual right, which might or might not have accrued to her. It would be dangerous to sustain a discharge in such a situation. It might be attended with very bad consequences if it was not to be set aside.

As to the decisions referred to, they do not affect the case ; because in them the father had predeceased. The only case where this is doubtful is that of Burgh ; and even there, there is an uncertainty. And, upon the whole, considering the obscurity in this case that it is not reported, and that there is nothing printed but what is in the appeal cases, I do not think that it is a sufficient ground for altering the interlocutor under review.

LORD PRESIDENT (HOPE.)

At this hour of the day, if it had appeared that this case could be decided by a clear majority, I should have refrained from doing more than just expressing the result of my opinion. But, as I perceive that this day the case will not be decided at all, I am afraid it becomes my duty to the parties to make them fully aware, as shortly as I can, of the grounds on which it proceeds. I was a total stranger to this case, from sitting in the other Division, until I sat down to read these papers. But I had not advanced ten pages in Mr Clerk's petition before I saw the difficulty and nicety of the question, and that it would be impossible to reconcile your Lordships' judgment to those of your predecessors. It so happened, however, that though I was a stranger to this individual case, I was no stranger to the nature of the question. I was counsel in the Fotheringham case, on the losing side, and I believe I was not quite convinced at first of the soundness of the judgment, though I have since become satisfied that it was right; and whether I were so or not, yet, sitting here, I am bound to hold that it was well decided. According to the light in which the Fotheringham case struck me, I thought the facts and the law on both sides, on the first branch of that case, were decisive of the present, without regard to the discharge at all. It was, however, with great pain, that I found this to be the current of my own ideas, when it was contrary to an almost unanimous judgment of your Lordships, fortified by the opinion of the great man who lately sat here. But the agents in the case did most properly furnish me with notes of his opi-

1812.  nion, revised by himself; so that I had the benefit of all the leading arguments on which he founded. But, in the first place, your Lordships will observe that, even with regard to him, it was an opinion subject to reconsideration—subject to the effect of the future argument of the reclaiming petition; and if I can form any conception whatever of what would be likely to pass in the minds of others, by what has passed in my own, I am persuaded that his Lordship would have seen cause to alter it. It is impossible to give too great praise to the papers on both sides.

There was another thing which struck me on reading the opinion I have alluded to. From the whole strain and scope of the speech, it appears that the learned Judge had formed his opinion under a strong persuasion that there was fraud and villainy in this transaction. And I need say no more, I think, to satisfy your Lordships that, with that persuasion, it was hardly possible for him to form an unbiased opinion. It is clear, from the whole of his speech, that he had entertained a most rooted and decided opinion that this transaction was a piece of great oppression and cruelty on the part of the father, and of injustice suffered on the part of the child; but so far as I looked for law or principle in his argument, I never heard one of his that carried less conviction to my mind. It was well observed, that it is hardly possible for us to divest ourselves of a certain bias, according as a transaction strikes us in different lights; but it so happens, that although I hope I have as indignant feelings as he or any man can have in such cases, yet, in point of evidence, when I review the transaction, I do not see it in that light. That it would

be unequal now is very true; in the *first* place, because 1812.
the estate is greatly increased in value, and her right to
it is now certain. In the next place, the deed 1708 is
now prescribed, and every consideration that entered into
the minds of the parties at the time, is now totally chang-
ed. But look at the transaction at the moment, and who
were the parties. The parties to be sure were a gentle-
man calling himself Francis Carruthers Esquire of Dor-
mont, but who, in the other end of the island, would just
have been called a yeoman, on the one hand; and, on the
other hand, his daughter, for so I am bound to hold her,
protected by her husband, the son of a yeoman like him-
self. So that whatever injustice had been formerly done
to his wife, at least he could now see justice done to her
and his children. These people come down here, not un-
der the influence of filial affection; they come down wag-
ing open war with the father, determined to assert their
rights; and under whose auspices? Under the auspices
of Mr Ewart, a most honourable man, whose name was
used to render matters more smooth between near rela-
tions. With concurrence, and under the auspices of Mr
Ewart, as honourable a man as ever existed, who, to
serve these young people, advances money to them, the
affair is adjusted. And what assistance does he procure
to the parties? The best that this bar afforded at the
time. Accordingly an action is brought for implement
of the contract of marriage, which the parties had an un-
doubted right to bring, and in which your Lordships must
have given a decree. But what decree could she have ob-
tained? Your Lordships would have told her, we can-
not give you a decree for the L. 1000, because you are
not only not *in titulo* to receive it, but it is not yet payable.

1812. If the estate had opened to a brother-german of this child, there is no provision to her at all. It is merely in the event of there being heirs male of another marriage to take the estate, that the money was given, and if he had, *bona fide*, made another marriage, and had male children, it was then, and then only, that the obligation could attach; your Lordships therefore must have assoilzied from that conclusion. The only decree which your Lordships at that time could have given against the father was, to compel him to make a disposition in terms of the marriage contract; and suppose you had done so, he would just disposed the estate to the heirs male of any other marriage, whom failing, to the eldest daughter of the first marriage. Even, therefore, if she had got decree in terms of her own summons, that was all that she could have got. Suppose he had granted such a disposition, he could not have altered it gratuitously, that is very true, but he might have contracted as much debt upon the estate as he pleased. He might have said, ‘ I am not going to restrict myself for you; I will launch out as far as I think my life is likely to extend; I will spend four or five hundred pounds more than the rental of this estate.’ Was there any thing illegal—was there any thing immoral in his doing so? No casuist could have held him guilty of any immorality or fraud, even if he had wilfully set himself to contract debt. Besides Mr William Carruthers, brother of Mr Francis, was then alive, who was not only heir under the marriage contract of 1708, but heir under an entail not prescribed; and though Francis would not have been entitled to rear up this entail to defeat his own obligation, under the deed 1735, William would have had a right to have had it found and declared that these titles were null and void,

and that Francis Carruthers was bound to make up his titles under the entail 1708. The contract 1735 was good against Francis personally, but if he left no personal estate, what became of it? Nothing. She would have had an action against her father's representatives, that is, against, herself. Therefore, what was the value of the right in her person at the time. I confess I can hardly put a value upon it. L. 650 was by far too much. Farther, he was conscious that he was not the father of the child. And is there any thing in nature more galling, than that a child in that situation should be forced upon him as his heir? What would a father not do in such circumstances rather than acknowledge such a child. He might have said I will marry the first woman that I see rather than submit to it. Mr Francis Carruthers made up his titles under the contract 1708, and is it possible to suppose, that this was unknown to the parties at the time? What would have been the character of the Faculty of Advocates, if there could have been found two of its members ready to lend their names to sanction a transaction illegal, nugatory, infamous and oppressive? What would have been the answer of any honourable men in such circumstances? Would they not have said, if the transaction is good, it is as good without the decree as with it? Agree upon the sum and take the best advice. If your Lordships, indeed, think that she did not discharge for herself, that is a different thing. But the estate of Dormont is expressly mentioned, and if I were to sit down, I could not; *ex proposito*, frame stronger words; 'all right of succession, &c.; either now or at any time, &c.; to the estate of Dormont,' &c. Holding the discharge as applying in point of fact, how does it apply

1812.

1812. in point of law? I cannot think the discharge itself worth one farthing as a discharge. The discharge is only necessary as a mere receipt or evidence of implement. There was no discharge taken from Fotheringham. The disposition of the estate of Balfour, which carried upon the face of it evidence of its being implement of the marriage contract, was good without a discharge. But the discharge is good here, not as a discharge, but as a receipt in full, shewing that the L. 650 was implement of the contract. Suppose a receipt granted for an open account, it is not necessary to add a discharge; or where a receipt is written on the back of a bond, there is no necessity for a discharge in that case. A party *in pleno jure* of an obligation, receiving implement of it, has no occasion to grant a discharge. The receipt itself of implement is a discharge, and the question is, was this an obligation that could be implemented and discharged. If it was, the fact of implement itself is a discharge. There were two points in the Fotheringham case. First, was it in the power of Mrs Fotheringham Ogilvie to dispoise the estate validly, not to the person who might ultimately be the second son existing at the moment? I believe there was no difference of opinion upon that point. It was settled by the cases of Burgh, Trail, and others. If I have a bond payable ten years hence, all that I can demand is payment at the distance of ten years; but is there any thing to hinder the debtor from saying, I will pay you now? Take the case of forehand rent payable by a tenant. All that the landlord may demand is payment when it becomes due, but what is to hinder the tenant from making immediate payment? The Court found in the case of Fotheringham, that although a second son can-

not demand implement, yet that, with the consent of the debtor in the bond, implement can be made to him ; and under what circumstances? Under circumstances of an avowed and proclaimed intention of defeating the contract of marriage. The whole transaction was a fraud from the beginning. It was done on purpose to join the two estates. But the Court found they were entitled to do so, because the parties in any contract have an indefeasible right to discharge it. Accordingly this was found, although the transaction was intended for the undisguised purpose of entirely defeating the provisions of the contract. It is that branch of the case of Fotheringham that was decisive of this, because when you tell me that two parties in an obligation have power to implement it, I ask, what power on earth but themselves has a right to regulate the terms? Where one is in safety to pay, and the other to receive, are they not entitled to settle among themselves what they are to pay and receive? It is true, that other heirs might eventually have a right to it, but your Lordships found, that that was not a good argument. Originally a contract of marriage was nothing but a destination, but it was afterwards settled that it gave a *jus crediti* to the heirs. The second point of the Fotheringham case, related to the clause of devolution, but the contract must have been fulfilled before there was any room for the clause of devolution at all ; and how your Lordships are to hold that there may be implement, and yet, that you are to prescribe to a party the terms of it, surpasses my comprehension. What is implement? Suppose Alexander Fotheringham had been the eldest son, and that the father had said to him, ' I will dispoise the estate to you, reserving my own life-


1812.



1812. rent,' it was just doing what had been done before ; unless that he gave him the fee of the estate, with which he might have gone to the Jews. But suppose the son had said, ' You will live for twenty years, and whatever I get upon the value of the estate, I must borrow under the burden of your liferent. But, in place of doing this, I will put a value on the liferent, and pay you a sum of money as the price of it.' If they had gone through this form, the transaction would have been good ; and what the parties might do *per ambages*, they might certainly do directly. The person here is *in titulo*, because no service is necessary, and the transaction is good without the discharge. The only other point is the difference between a discharge to a father, and a conveyance to a third party. As to this, in the *first* place, a contract of marriage is not an unilateral obligation. The father remains as having an interest for all his children, and he is entitled to say, that ' though I may implement it to you, yet I don't chuse to do it. I know you are a spendthrift, I will run your life against that of your younger brothers.' This is not the case of an unilateral obligation, which the creditor may assign, and where it is *jus tertii* to the debtor. It is not *jus tertii* to the father. You may discharge as the creditor, but you cannot convey, because there is no right vested in you. It is not because there are any subsequent heirs, but because you are not *in pleno jure*. It is just the case of a lapsed legacy, where the legatee could not convey, because the right was not vested in him, and might never vest. Suppose an obligation to a person to be implemented on the day she is married ; she has no right to convey before her marriage, but there is no question that she may discharge.

The Court being equally divided, the cause stood over 1812. for Lord ARMADALE'S decision, who, on the 14th May 1812, delivered his opinion as follows.

There were three deeds, executed at three different periods; and, upon the consideration of these deeds, the whole question, the whole right and interest of the parties to this property of Dormont, is now to be judged of by this Court. This estate, in the year 1708, was not a matter of much consequence, so far as appears from any thing in the papers. It was the property of Carruthers of Dormont; and, upon the marriage of the eldest son, there is an accession to the property of the mutual communication of the properties belonging to each party, which are settled by a contract of marriage. There is also a deed of entail, containing prohibitory, irritant and resolute clauses, and meant to be an entail of these two properties, in favour of the heirs male of the marriage of the eldest son, and the heirs male of that son by any other marriage, in preference to heirs female. By the settlement under these clauses the property was for some time possessed. Afterwards, a post-nuptial contract of marriage was entered into betwixt Francis Carruthers of Dormont and Miss Maxwell of Monreith, in 1735; and by that contract, there is a provision in favour of the heirs female of the marriage, in case the estate should go to heirs male. Afterwards there was a divorce, on the ground of admitted adultery, in 1740; and in 1741 Mrs Carruthers was delivered of a female child, who was the sole produce of that marriage. A separation was the consequence, and some intention of challenging her right of succession, upon the ground of illegitimacy; and your Lordships see, that she, the daughter of this marriage,

1812.  went to reside in the north of England. She then married Mr Routledge; and in 1758 she and her husband came down to Scotland, to take advice upon the subject of her rights; in consequence of which, an action was brought for implement of the contract of marriage, before the father's death. She was advised that she was entitled to transact what right she possessed; so that, by that advice, it seems to have been so far understood, that there was competency in her doing something; and accordingly they proceeded with the action, which was brought upon most solid and substantial advice; and then, after it had depended for some time, we come to consider the most important transaction that took place with regard to the right which the parties were advised they had by the law of Scotland. The father had strong suspicions with regard to the legitimacy of the child. After this action came before the Court, your Lordships see what was the nature of the proceedings. The parties saw that the estate was not then of the value supposed: they saw, and must have known, what the state of the original title was: they knew the powers that were vested in the father with regard to his children,—the power that he had over the property,—that he was not fettered by any entail,—that he had power to burden it with debt, and that the heirs of entail might have come under the deed 1708, and insisted on having the deed implemented, so as to destroy any burden that had been created to the prejudice of the heirs male. What was the situation of the parties, in point of legal right? Your Lordships see, that an agreement was executed between the father and the daughter, with consent of her husband, and with consent of Ewart the cautioner; and then the parties, taking into consideration the state of the pro-

perty, and their own legal rights, enter into a regular 1812. transaction: they take the advice of the most eminent counsel at the Bar then capable of instructing them upon the subject: they stamp this transaction with the strongest validity that could be fixed upon it. The arbiters then pronounced the decree-arbitral in terms of the agreement, by which they fixed a certain sum to be paid. It is in that situation that this contract is completed in the most solemn manner that any transaction can be. The action is commenced in 1758; and, at the distance of a year, the final transaction received the consent of all parties; and a bond is granted by Ewart, as cautioner, for fulfilment of the agreement. When I look to the terms of this submission and decree-arbitral, I think they amount to a full and explicit settlement of every thing that arose out of the contract. All claims, all interferences betwixt the father and daughter, are included in the submission, and afterwards a decree-arbitral is pronounced, in consequence of which the parties renounce and discharge the father of every thing; and, as a counterpart to this, Mr Carruthers immediately does what appears to be very proper; he executes a settlement in terms of the original deed of entail. Whatever the value of this property was, this was considered as a full equivalent for it. It shows that every thing was taken into view; and, upon a certain day immediately after the contract, the money is paid to the party. The bargain is distinctly implemented. For a long period all parties acquiesce, but now it is challenged at the distance of forty years.

Whatever respect I must bear to the opinions of other Judges who have preceded me, I am bound to form my

1812. own opinion ; and when I consider the real situation of the parties, I am clear that there was a settlement then made, liable to no sufficient objection. Whatever difference has arisen in the value of this estate, from the improvement of land, forms no part of this question. The land must be considered as it stood at the date of the agreement. I am satisfied that there is no ground for any charge of fraud in the case, nor for any charge of haste or rapidity. On the contrary, the transaction was completed in the most careful and deliberate manner ; and I am clear that this is a deed which your Lordships are not entitled to touch, unless you can show a total want of power.

In considering the point of law, whether a father and a child can discharge, by fulfilment of the contract to the heir, to the *persona predilecta*, by giving her the property, or a sum equal to her provision, I am of opinion, that the right of the parties to do so is supported, not only by the ancient law of Scotland, but by all the improvements that have arisen from subsequent cases, as stated fully and clearly in the petition that is now before me. There is a fixed right in the father to give, and in the child to receive, what he would be entitled to receive under the contract. The cases of Stewart, of Brough, of Elshieshiels, of Craigie, and of Fotheringham of Powrie, are strong and decided examples of what the law was understood to be at the time, and what the practice has since confirmed it to be. The *persona predilecta*, by a simple provision in a contract of marriage, consenting to an arrangement deliberately and clearly made, is bound by such arrangement, and thereby puts an end to the right of the substitute heirs. Seeing such a transaction deliberately con-

cluded in this case, and acquiesced in for so long a time, 1812. I am clear that the right of the substitute heirs was extinguished, and that Mr Carruthers and his daughter had full power to do that which they accomplished by the fullest consideration, by the best, and most deliberate, and able advice, from the first lawyers then at the Bar, and afterwards distinguished Judges in this Court. With their opinion and advice I concur, and my opinion is grounded thereon in favour of the petitioner.

The Court then altered the former interlocutor, and gave judgment in favour of William Thomas Carruthers.

Counsel for Mr Routledge, Cathcart, Erskine, &c.; John Marshall, Agent.—Counsel for William Thomas Carruthers, Clerk, Moncreiff, &c.; Alexander Young and Roger Aytoun, W. S. Agents.

*(SECOND DIVISION.)***THE CASE**

OF

JOHN POLLOCK, ESQUIRE,**CASHIER OF THE COMMERCIAL BANKING COMPANY OF SCOTLAND,**

AGAINST

DAVID PATERSON, ESQ. OF COSTERTON,**AND CHARLES STEWART, W. S. HIS CURATOR BONIS.**

1812. **Mr** DAVID PATERSON carried on, for many years, a very extensive business in Edinburgh, as a banker, insurance-broker, and underwriter. His connexions, in these departments of trade, were numerous and respectable, and his speculations and transactions were attended with the most prosperous results, insomuch that he was enabled to purchase a valuable property in the neighbourhood of Edinburgh, which he was generally understood to possess independent of the large capital he had invested in business.

Having occasion to go to London in 1805, Mr Paterson executed a procuration in favour of his eldest son, John Paterson, who had been bred to business under himself. This procuration is of the following tenor.

‘ I David Paterson, *banker and insurance-broker in Edinburgh*, considering it proper to appoint some person to act for me at any time *when absent*, and having confidence in my son, John Paterson, for discharging this trust; therefore, wit ye me to have nominated, constituted, and appointed, the said John Paterson to be my procurator and manager, to the effect underwritten; giving, granting, and committing to him full power and authority, for me and in my name, to transact and manage my business and affairs in general; and in particular, to accept bills, grant promissory notes and other obligations, as also to subscribe policies of insurance for me, and in like manner to indorse and discharge bills, grant receipts, and adjust accounts, and do every thing else anent the management of my affairs, *that I could myself if present*: Promising and obliging myself to ratify and approve all and whatsoever things the said John Paterson shall lawfully do or cause to be done in the premises: Declaring, that all bills, promissory notes, policies of insurance, receipts, accounts, and other writings, to be signed by him, during the continuances of this procuration, shall be as binding and effectual against me *as if signed by myself*.’

In virtue of this procuration, Mr John Paterson entered upon the management of his father’s business; he accepted bills, granted promissory notes, settled accounts,


1812. subscribed policies of insurance, and generally conducted the whole business *per* procuration of David Paterson, in the same manner in which it had been previously carried on. It was continued in the same office; the books were kept in the name of David Paterson, and all documents were subscribed by John Paterson, *per* procuration of David.

Soon after granting the procuration, David Paterson set out for London, where, almost immediately upon his arrival, he discovered symptoms of mental derangement, and, by the advice of physicians, was soon after brought to Scotland, under the controul of a keeper. Since that time he has resided in retirement with his family, wholly abstracted from business. No steps were taken for cognoscing him, or rendering his situation known to the public; and though it was generally given out that he was unwell, or in low spirits, yet, from motives of delicacy, his friends avoided entering into particulars.

From 1805 to November 1810, the extensive dealings of the house were carried on by John Paterson under the procuration, in the same manner as they had formerly been by David Paterson himself. In 1809, John Paterson entered into business on his own account as a general merchant, in partnership with a Mr Robert Ker, of Leith, and their transactions were carried on upon an extensive scale. These parties became largely indebted to David Paterson; and, at last, from the general distress and embarrassment to which the pursuits of commerce have been lately exposed, and the consequent failure of several respectable houses, the concern of John Paterson and Ro-


bert Ker having stopped payment, sequestration was 1812.
awarded against them in December 1810. 

The affairs of Mr David Paterson, carried on under the procuration, fell into disorder in consequence of these events. As the procurator himself was bankrupt, and no person would interfere to take charge of the funds which had been under his management, the creditors resolved to pursue the necessary measures for obtaining a sequestration. With this view, a charge was given to Mr David Paterson, at the instance of John Pollock, Esq. manager of the Commercial Banking Company, upon a bill of exchange, subscribed by John Paterson, as procurator for David. Of this charge a suspension was offered, in name of Mr David Paterson himself, upon the ground that he was *non compos mentis*, and had been so since May 1805; for which reason it was contended, that all transactions entered into under the procuration, since that period, were void and null. The case was reported to the First Division of the Court, in December 1810, by Lord Armadale, when after appointing a tutor *ad litem*, the bill of suspension was refused, by an unanimous judgment. A second bill of suspension was offered to Lord Robertson, in the course of the Christmass recess, who, after hearing counsel, refused the bill, but, in respect of the situation of David Paterson, granted him a personal protection. A poinding was then executed of his effects, and, on the 26th of December 1810, a petition for sequestration, under the bankrupt act, was presented to the Lord Ordinary on the bills; which was opposed, in name of David Paterson, and of Mr Charles Stewart, W. S. who had now been appointed his *curator bonis*, upon the same grounds which

1812. had been previously urged for a suspension of the diligence.  The petition was followed with answers, and other written pleadings, all which came to be advised by the Second Division of the Court, in March 1811; when their Lordships at first declined to award sequestration, until the case should be solemnly heard in their own presence. But afterwards, upon a petition for the creditors, they awarded the sequestration, in order that the estate might, in the mean time, be put under proper management, reserving to Mr Paterson to apply for a recal of the sequestration, if he should be so advised. A petition was accordingly given in, without delay, praying to have the sequestration recalled; upon advising which, the Court appointed counsel to be heard in their own presence, in the then ensuing summer session. The proceedings, however, were afterwards delayed, until the issue of an application for having Mr David Paterson cognosced. This last question came on before the Sheriff of Edinburgh, and a respectable jury, in the beginning of November 1811, when an unanimous verdict was returned, finding that Mr Paterson became *non compos mentis* on the 14th May 1805, and had remained so ever since.

The proceedings were then resumed in the Court of Session, and the case was fully heard in presence of the Second Division of the Court.

On the part of the *curator bonis*, it was maintained, that the mandate or procuration to John Paterson fell to the ground the moment the insanity took place; that all transactions entered into by the mandatory or procurator, subsequent to that period, were *funditus* void and null; that there

was, therefore, no debt due by David Paterson, and, of 1812. course, that the sequestration ought to be recalled. 

This conclusion, it was maintained, is founded on the very nature of a mandate, which being created by the will of the mandant, and continued in force by the same cause, must cease to operate as soon as this support is taken away. The strict rule of law, however, is, in this case, modified for the convenience of practice; and either where a mandatory is left in the midst of unfinished transactions, or where the death or incapacity of his constituent is unknown, he may go on with his trust, until he has brought his business to a close, or until he is apprised of the event which deprives him of his powers. But the plea of ignorance can only avail where there was no opportunity of being better informed; for those who transact with a mandatory are bound to inquire into the validity of his powers, and if they overlook any flaw in the instrument under which he acts, which ordinary vigilance might have discovered, the transaction is held to be void, and they must abide by the consequences of their own culpable ignorance.

This view of the doctrine of mandate is supported by the authority both of the civil law and of the law of Scotland, wherein a mandate is invariably held to be personal between the two contracting parties, and voided by the death or incapacity of either. Something, indeed, is mentioned, in the Roman law, of a mandate or commission remaining in force even after the death of the granter, unless it be specially recalled by his heirs. But that branch of the civil law has been sparingly adopted in

1812.

our practice, and it is, besides, only applicable in case of death; for it would be inconsistent with every principle of reason or equity, that an insane person, for whose protection the laws of every civilized nation so anxiously provide, should be bound, to his utter ruin, by an obligation which he himself was incapable of revoking, and which, in point of fact, was not revoked, owing to the negligence of others.


In applying the law to the case in hand, it was said to be clearly made out, that from the moment of Mr Paterson's insanity—from the moment when he ceased to have any *will*, the procuration lost all validity; for a procuration to do business, derives its force as much from the will of the granter as any other species of mandate; and the point at issue comes therefore to be, whether the parties, in the transactions in question, had any knowledge of Mr Paterson's incapacity, or whether they might, by due diligence, have acquired such knowledge?

Upon this point, it was contended, that Messrs James and George Spence, the drawers of the bill in question, must have been actually acquainted with Mr Paterson's situation; a supposition rendered the more probable, from their intimacy with the family—from their knowledge of Mr Paterson's journey to London—of his illness there and afterwards; and from the repeated inquiries they, from time to time, made after his health. Though aware, however, of the situation in which Mr John Paterson stood, and that he was not empowered to pledge his father's property for his engagements, they took his signature under the procuration, probably considering

it as, at any rate, some addition to his own personal security. 1812.

Nor can it be easily believed that Mr Pollock (to whom the bill was indorsed), residing in the same place with Mr Paterson, and even his near neighbour, could have been ignorant of his real situation. Mr Paterson had, for more than five years and a half, been withdrawn from the world, and from all sort of business, and it was never understood that he sought retirement for the sake of ease and comfort; since, if this had been his object, as he resided in Edinburgh, where his business was carried on, he must still have been occasionally seen in his own counting-house, during a period of five years and a half. It is a fact, however, that Mr Paterson was never visible, during all that time, in his counting-house, nor ever was known to have been engaged in a single transaction in business. Was not this sufficient to rouse the suspicions of the most unwary, and to excite inquiries as to the condition of the granter of the procuration, upon which its legal validity entirely depended. Was it not incumbent, in short, on those who did business with Mr John Paterson, to satisfy themselves of the extent of his powers, under a procuration, the granter of which, though residing on the spot, had been buried in obscurity for five years and a half; and, if they failed, from a want of due vigilance, in ascertaining this point, ought not they, and not Mr Paterson's family, to bear the burden of their own culpable neglect.

These reasonings derive great force from the fact, that the validity of the procuration in question was rejected by

1812.  several persons who had business to transact with Mr John Paterson, under its authority. For example, the Royal Bank, where Mr David Paterson had a cash account, would not allow Mr John Paterson to operate upon it by procuration ; and he was, in consequence, obliged to open a new account with the Bank, in his own name, and with new sureties. This fact seems to be decisive of the question at issue, expressing, as it does, the sense of an intelligent body of men, as to the inefficacy of the procuration to establish any claim against the estate of David Paterson.


It was maintained, besides, that no claims, under such an instrument, however valid against John Paterson, can affect the estate of David Paterson.

On the other hand, without disputing that in common cases mandates fall by the death of the mandant, it was argued, that a commission for the management of a mercantile concern may continue in force for any length of time after the death of the granter, under the implied mandate of the heir, though in a state of incapacity from non-age or insanity. Some time being necessary to wind up the concern, the validity of the procuration during the interval is admitted, and if the executors, in place of requiring the manager to bring the business to a close, allow him to go on, their silence is held to imply their consent, as unequivocally as the most express mandate ; and as they are in that case fairly entitled to all the profits of the business, the clearest principles of justice require that they should take their chance of the loss. A provision to this effect accordingly makes a part of the law of every civilized nation, in regard to mercantile procuration ; and

even the Roman lawyers, though not very ready to accom- 1812.
modate the general rules of law to the necessities of com-
merce, are still clear upon this point; holding the heir
bound by his silence, even in cases of non-age or mental
incapacity, where he might be considered as peculiarly
privileged.

This principle must be decisive of the question; for, is it consistent with any rule of justice, that Mr Paterson's family should permit the business to be managed under the sanction of his procuration for five years—should quietly see the public deceived by its authority—should be in a situation, in short, to reap all the profits of the business, and, when they apprehend a loss, should be entitled to break the most important engagements, on a plea unknown to any of the contracting parties, and purposely indeed kept out of their view? If they were desirous to avoid the risks of the business, their plan was clearly to apply for the appointment of a *curator bonis*, who might exact from the eldest son an account of the funds in his possession, and see them laid out for the behoof of his father. No such application being made, the clear inference must be held to be, that the family were content to take the chances of the business. These chances have turned out against them; and their object now is to shake the faith of transactions, of which, as they would have reaped all the profits, they ought surely to abide by the loss.

The assertion that Mr David Paterson's true situation was known to the creditors, was positively denied. They knew, indeed, that he was unwell; but they had

1812. not the most distant suspicion that he was unable, if he  thought proper, to revoke the procuration; in proof of which they referred to the notorious fact of the unbounded credit given by the procuration to David Paterson's bills, with all the chartered and private banks in this city, and with every mercantile house. Transactions to the extent of greatly more than a million must have been carried on, under its authority, since the date of the procuration; and it is surely not to be supposed that credit to such an extent could have been procured by John Paterson, possessed of no property, claiming no credit on his own account, but merely subscribing *per* procuration of his father.

The procuration was, besides, notified to Messrs Spence, who continued their transactions with the house as formerly. Mr David Paterson's name alone remained also on the banking house. The business was still carried on entirely in his name. His name was still inserted in all the public lists of bankers, printed in the almanack, and otherwise; and how was it possible for the public to guess, in the face of all these facts, that a plea was in reserve to screen Mr David Paterson's property from the fair risks of the business in which it was embarked?

The objection of the Royal Bank to give cash for John Paterson's draughts on his father's cash account, arose not from any suspicion as to the validity of the procuration, but from doubts how far, from the nature of the obligation, the draughts of any other person but David Paterson himself, could have been effectual against the cautioners in that cash account. The Royal Bank, however,

continued to discount, to a large amount, both bills and draughts under the procuration, which never would have been done, had there been any doubt of its validity. 1812.

It was finally observed, on the part of the creditors, that there never existed any reasonable ground to suspect the true nature of Mr Paterson's malady. It appears that he lived with his family, amusing himself with backgammon and whist, and such other games, and he even went from home on an excursion of pleasure to England.

In these circumstances, suspicion was impossible; and as no intimation was made by his family of his real situation—as nothing ever occurred to cast a doubt on the procuration, its authority, on the faith of which such extensive transactions have arisen, cannot now be touched, without shaking the security of the most solemn contracts between man and man, and occasioning injustice and confusion unspeakable.

Upon these pleadings the cause was advised by the Judges of the Second Division of the Court, who delivered their opinions as follows :—

LORD MEADOWBANK.


This is a case of very considerable interest; the transactions to which it relates are of great magnitude, and have been carried on for a course of years, with all possible publicity, in the midst of this metropolis, in dealings with banks, bankers, and principal merchants; and now,

1812. at the lapse of these years, are alleged by the petitioners to be all void and null, in virtue of the verdict of a Jury obtained by them, whereby it is found, that the person in whose name the business had been carried on, was at the time *non compos mentis*. At the same time the petitioners do not dispute, that the mandate on which these dealings proceeded was granted and acted upon before that incapacity existed, which the verdict has established; and it is obvious, that hardly any thing could prove more fatal or more alarming to commerce, than the doctrine, that latent and emerging disabilities, unknown to fair dealers, should shake the validity of mandates, on which the public deemed itself safe to rely, in carrying on the ordinary course of business. A vast proportion of mercantile transactions proceed on mandates express or implied. A great merchant is just a great mandatory. The most extensive functions of the greatest commercial houses of all descriptions are carried on by institors who are so many mandatories. The powers of all such persons must obviously, as a matter of the first necessity, rest on plain and simple principles, and afford decisive confidence; so that while the evidence of them must be as obvious, as if it were only *prima facie*, it must possess the characters of the utmost stability. The petitioners have not attempted to shew any correspondence betwixt their claim and these obvious requisites of commercial dealing; nor have they attempted to extricate the results upon the various transactions in question, of the nullity of which they plead. On the other side the gauntlet was thrown down, and the petitioners urged by every consideration to meet the challenge, but not a glimpse of light was afforded to your Lordships

on this department of the discussion, and you were left to 1812.
 broed on the allusion so happily furnished by the respon-
 dent's counsel, who compared the separation of these
 transactions, according to their several origins and ends,
 to an attempt to trace, in the human body of David Pater-
 son, the particles which have proceeded from the various
 alimentary matter furnished him during the five years
 preceding the sequestration.

On the other hand, there are certainly difficulties of no
 small moment suggested on the part of the petitioners.
 The law unquestionably is the natural guardian of imbe-
 cile persons; and the picture is certainly most interest-
 ing that was drawn to us of a person thrown suddenly
 into a state of lunacy, disabled from looking after his
 affairs, and exercising the natural controul over his insti-
 tors and mandatories; and, on his recovery, finding his
 property lost through their misconduct, and himself irre-
 trievably ruined, unless there be some principle in the
 law to afford him relief,

Your Lordships are now called upon to decide the con-
 troversy; I do not however think in the happiest form.
 You are required at once to recal the sequestration, which
 does not seem to be a proceeding calculated for doing jus-
 tice. I do not think it is doubtful whether you are en-
 titled to recal it. Whatever you may think of many of
 the other debts, it is at least clear, that the debt on which
 the sequestration proceeds is justly due by David Pater-
 son; and where is the machine to be found for winding up
 the affairs of the very extensive concern under your con-

1812.  temptation, if the sequestration were laid aside? There are many creditors, forming different classes, deeply interested in the estate *in medio*, who never had an opportunity of being heard upon their *bona fides*, and upon their other pretensions; and there seem also to be many that may plead, that their debts are just debts of David Paterson, or the *surrogata* of debts prior to his insanity. In these circumstances, I have no sort of hesitation in declaring my opinion, that there is no more expediency or justice in recalling the sequestration, than there is law to warrant your Lordships in such a measure. The sequestration ought to proceed; and there David Paterson's tutor, and every creditor, will have a fair opportunity of maintaining all just claims under it.

Here I might stop, but I conceive I should be doing injustice if I were to overlook the deep interest which the parties, and I may say the country, has to learn the opinion of the Court on the merits of the great question at issue, or to omit to deliver my humble sentiments upon it. The case has been argued with the greatest ability; and your Lordships cannot reasonably expect any further and material aid to enable you to form your judgment; and it is certainly of the last importance, that the general question should speedily be set to rest.

The argument maintained by the petitioners is, in substance, this:

The general rule of law is, that mandates perish by the death of the mandant; that furiosity is equivalent to

death; that it extinguishes will, the will which maintained the mandate in force. Therefore, the procuration of John Paterson fell by the furiosity of his father; and, by the public law of the land, all deeds done by David Paterson are *ipso jure* void, under the verdict of the jury finding him *non compos mentis*. On the other hand it is maintained, that furiosity does not put an end to the mandate; that death does not, *sua natura*, put an end to it; and that the only way in which it can be put an end to is, by performance, or executing the transaction ordered, or by publication of a recal. And it is argued, that a mandate would be good after the furiosity of the mandant, if he had granted it *eo intuitu*, and had said, This is a mandate to be carried on, even although I should hereafter be affected with insanity. In such a case, without doubt, all the transactions under it, after the furiosity, would be valid. Mandates, therefore, not perishing *sua natura* by death or insanity, but requiring promulgation to be recalled, and no promulgation having taken place here, but, on the contrary, the public being rather kept in ignorance of the incapacity, it is maintained, that there is no ground for holding that the mandate is recalled. Now I certainly do say, that the general rule *morte mandantis perit mandatum* is liable to so many exceptions, as to show that there must be a still more general principle applicable to the question; and such principle, if it explains both rule and exceptions, must be the true ground on which the mandate is to be held as at an end or recalled. That principle seems to me to lie before our eyes. All acts of the will, relative to a man's affairs, are complete and final in themselves, and have an effect for ever, until they meet

1812.

1812. with an obstacle, or until their purpose is accomplished;

— In the case of an ordinary mandate, the party means to get his affairs managed during a period not exceeding his life. The object of mandate, in the general case, must terminate with life. But, in many cases, the act of the will that created the mandate does not perish by the death of the person who wills. His will gives place to another will—the will of the heir. A new will exists; and, if there are not other circumstances to stop or impede the impulse of the former will, the mandate must be executed. The death, though a matter of notoriety, does not extinguish the energy put in motion, but only leaves it subject to the will of the new proprietor, and separate from it. What difference is there between the nature of mandates and that of trusts? Trusts are mandates, to be executed after death,—*mortis causa* mandates, that may last for many generations. There is no difference in the nature of the thing, I mean in the common principle from which they derive their force, though there is certainly great difference in the *subjecta materia*, viz. their ordinary objects. Whether they endure for a day or for an age, they plainly derive their whole efficacy from a past and completed act of the mandant, and require no reiteration of acts; no renewal of power; not even a continuation of confidence. The loss of confidence does not recal the mandate. There must be an explicit act of recal to produce such a consequence; and there may be preponderating circumstances to induce the mandant not to recal his mandate. He may be of opinion, that considerations of prudence, after the loss of confidence, prescribe the continuance of the mandate. The confidence may be lost, and the man-


date, from the dictates of temperate wisdom, may be pre- 1812.
 served in full force. But this is not a new act. A con-
 tinued confidence is, no doubt, the subsisting operation or
 state of the same mind, and the loss of confidence is also a
 subsisting state of that mind. But it is obvious, that if the
 loss of confidence is not a recal of the mandate, the sub-
 sistence of confidence is not a reiteration of it. Confounded
 as confidence and renewed mandates seem to be by the pe-
 titioners, nothing can be more obvious than that however
 confidence may fluctuate, mandates subsist from their
 original force, unless recalled or otherwise terminated :
 their subsistence has no connection with the train of
 thought in the mind of the mandant. A man may
 never think of his mandatory when he has once entered
 upon his course. He may send him to the *ultima thule*,
 or the *antipodes*, and dismiss him from his thoughts. The
 deed is done and he thinks of it no more. He may die to-
 morrow, but the whaler at the South Pole must continue
 to execute the mandate, and bring home the ship. It is
 the result of a finished act of the will still operating. It
 is not like gravitation, a constant renewing and accumu-
 lating power, but rather like the force of impulse ; when
 once communicated to a body, the action of the impelled
 substance continues till counteracted by an opposing
 power. Such is the nature of human affairs ; there is no
 necessity for a continuation or renewal of any moral exer-
 tion to uphold the mandate. It remains valid *sua natura*,
 having been once rendered so.

This being my opinion on the general nature of the
 principle, what is the mandate in the present case ? There
 is a mandate to John Paterson, to carry on the business.

1812. Has there been any will exerted, recalling this mandate?

The mandant was mad, it is said, and became incapable of an opposite will. But, *ex concessis*, there was no will exerted, nor capable of being exerted for such a purpose, till the will of Mr Charles Stewart was, by legal authority, rendered competent to recal the mandate; nor, was there any legal or adequate obstacle, to counteract or impede the will of the mandant. Nothing short of that will, I apprehend, could do it. It might be matter of indelicacy, impropriety, and rashness, for the mandatory to continue to act under such circumstances, or it might be virtuous, filial, and expedient. All that is to be settled between him and the *curator bonis*. But, was there any recal that disabled his actings? Was he not in the public possession of the whole funds of this gentleman, sitting in his counting-house, and employing them according to his discretion? And can it be doubted, that he was there possessing the fullest competency for carrying on the whole operations? This was the aspect of institor exhibited—the advertisement to the public. If a person does not provide for his own lunacy, but trusts to the protection of his friends, he must suffer the consequences of any omission or neglect of theirs. Your Lordships must believe, that David Paterson trusted in this manner to his friends; and if his friends omitted to take measures for securing his property, there may have been a want of that prudent controul, necessary to check any rashness of his mandatory. But, is the public to blame? Are the creditors to blame? Seeing, as they did, this gentleman surrounded with all the evidence that could be required from the recognized institor of his father. My opinion certainly is, that until there was a mind compe-

tent to recal, John Paterson was the subsisting manda- 1812.
 tory of David Paterson, and that the very insanity itself
 tended to prolong his office, and was by no means fatal
 to it. The incapacity to recal! Why should that put
 an end to a deed already granted? Such a measure must
 be provided for by the legal management being created,
 and a new capacity competent to recal created and ex-
 exercised, before the public can be interpellated. This view
 of the matter derives a great deal of strength from the
 very able argument maintained at the Bar, as to the effect
 of a *bona fide* dealing with a person who has a recalled
 mandate, or a mandate which had been circumscribed by
 a public advertisement over the threshold of his shop,
 with the limitation obliterated in the inscription; for
 even in that case, where the recal or the limitation is not
 publicly known, your Lordships have the evidence of
 many authorities, that the Roman law holds the *bona fide*
 dealer to be safe. Now this surely affords an argument
a fortiori for the creditors. Indeed your Lordships see,
 that in this case there is no recal at all. The mandate
 remains at its full breadth, without a mind existing com-
 petent to recal it. In the case stated by the Roman
 lawyers, there was a recal, and the mandatory was in
perissima fide; he knew that his mandate was recalled, or
 circumscribed. He proceeded however to act upon it,
 and yet it is laid down, that he binds the mandant. Here,
 there is no proper *mala fides* on the part of John Paterson.
 He might, or he might not be guilty of great indelicacy
 or impropriety, but what had the public to do with that?
 The mandate stood unrecalled; he acted under it; all
 the world dealt with him; and they had no occasion to
 look farther than his recognized situation. Some of the

1812.  old gentleman's friends, particularly Mr Manderston, suggested the propriety of some controul; but nothing was done. Was not the public then left at perfect liberty to go on? Suppose they had known the situation of David Paterson, I think they were entitled to go on. It was not their business to enquire, why a tutor at law was not appointed. The public institor remained at the head of the business; was it their province to doubt? And would it not shake the security of all such dealings, if your Lordships were to put out your hand, and touch transactions upon the stability of which all the world had an ostensible title to rely, and did in fact rely. It would be obviously unjust, to impose upon the public the burden of enquiring into the situation of David Paterson, without conferring on it also the means of doing it competently and effectually. But the public had no means to investigate, to try, and to determine the actual condition of David Paterson, or the true nature and extent of his indisposition. Was it mere low spirits and love of retirement? Or, was it an actual derangement of intellect; and had it the aspect of being a transient, a lasting, or an incurable malady? Dealers and creditors had no competent method of obtaining more satisfaction than David Paterson, when certainly *sane mentis*, had thought proper to afford them. His universal mandatory continued to act. His *mensa* stood in the *forum*, and the institor there continued to transact his business. Nothing was done by his family or friends, to impeach these public testimonies of power, competent to bind David Paterson, and the public had no means of searching into his domestic privacy. The public ought not to suffer from any possible indifference upon the part of David Paterson's friends and family, nor for any inde-

licacy or rashness on the part of his institor, more than for 1812.
the actual malversations of the institor.

It was said that the statute law of the land cuts down all deeds done by an insane person, from the period of his insanity, as fixed by the verdict of a jury; and there is no doubt that it does. But the deeds of a mandatory, whose powers are derived from a commission granted before the insanity, are not the deeds of an insane person. It is said that, in this case, John Paterson's commission bears that his deeds were to be as valid only as those of David Paterson himself; and that as David was insane, and his deeds were of no force, so neither could the deeds of John Paterson, by the express terms of his commission, possess more force than those would have possessed of David himself. This perhaps is too palpable a quibble to deserve any remark, since it is obvious that the deeds alluded to in the commission are the deeds of David Paterson *sanæ mentis*, and that of course the only legitimate construction of the commission is, that John Paterson's deeds under it would be just as valid as David Paterson's would have been, had he performed them himself and been *sanæ mentis*.

Having delivered this opinion, I presume it will be understood that, however clear I may be at present, I do not mean to preclude myself from altering it altogether if I shall see cause; and that I reckon superfluous to touch upon these cases where John Paterson may have been rash enough to be *auctor in rem suam*, or grant accommodations to himself in a separate character. It is a general rule in morality and law, that a manager cannot

1812. *be auctor in rem suam*, and third parties are bound to notice this maxim *unusquisque debet scire conditionem ejus cum quo contrahit*. In this view of the matter, I can easily conceive that there may be difficult questions to decide upon these and all claims of creditors in a subsequent ranking; much may occur as to which I do not mean to say any thing at present.

LORD GLENLEE.

I have no idea that we can recal this sequestration any more than we could have refused to grant it at first. Indeed the conclusion now is stronger in favour of the sequestration than it was then, for there was then no allegation that the debt is *funditus* void; and had there been any evidence of this allegation, there can be no doubt that it would have been stated. But so far from this, there is a very express statement, that Paterson had funds of Spence's when the bill was drawn, so that the debt itself was a good debt. This bill was truly drawn on David Paterson, who, at the time, was owing Spence a much larger sum. Now, if that be the case, suppose there were no such thing as the law of sequestration at all, can there be any doubt that a poinding would have been sustained upon it? Although it may be said that a bill granted by a madman or his manager or instigator, is not *per se* sufficient evidence of the debt, yet when I see it supported by other and conclusive evidence, would I ever suspend the diligence? In short, there are no grounds upon which we can at present say that there is not a debt due by David Paterson; and that being the case, upon what grounds can we recal the sequestration?

It would be a very difficult question, if we had sufficient evidence before us that there was no ground for this debt ; since perhaps there might be some difficulty in allowing other creditors to found upon that debt. But when no such thing is made out to us, how can we possibly recal the sequestration ? In this view I am almost disinclined to enter into the other question ; and all I mean to say upon it at present is, that I do not consider the true source of the claims to consist in any thing that was done after the old man's insanity. They depend upon, and are the result of a certain risk, which he undertook when he granted the mandate. It is not a just view of the case to suppose that there are only two people concerned. The man who grants a procuration of this nature, comes under engagements to the whole world, and necessarily undertakes the risk of every circumstance, not of public notoriety, that puts an end to the mandate. Suppose three persons were present when a procuration of this sort is granted ; *first*, He who grants the mandate ; *2dly*, The mandatory ; and, *3dly*, A person to represent the whole world. This last person may be conceived to say, ' This is all very well, but we do not know but you may die, or wilfully recal the mandate, or go mad.'—' O ! but (says the mandant) you will still be perfectly safe to deal with the mandatory, because it is fair and just that the risk of all this should lie upon me.' This seems to me to be precisely the sort of obligation which the law presumes every man to contract in similar cases. Suppose a man in sound mind purchases a bill for value from the holder. He takes upon himself the risk that he shall give due notice of the dishonour. But if he become mad, and the due negociation be thus neglected, will he be restored against this mischanter

1812.

1812. by saying, 'I was not in my sound senses, and therefore incapable of giving proper notice?' I have no idea of such a thing. He undertook the risk when he purchased the bill. The consequence must therefore fall upon himself, and not upon those who had no means of supplying his defect. Now, granting that the procuration necessarily came to an end *quoad* all those who knew of the insanity, yet, with respect to those who did not know, he and his estate must stand the consequences. How the matter may be adjusted, with reference to such creditors as knew of the insanity, I do not at present say. I think that if a man really and truly advanced money, which was applied for behoof of David Paterson, although he knew of his insanity, still his claim would be good. But, on the other hand, if he knew that the son was applying the money for his own behoof, I should rather think his recourse lost.

LORD GILLIES.

My opinion is much the same with that of such of your Lordships as have already spoken. It is certainly, in the first aspect of it, a most distressing case. Both parties are *in bona fide*, and both have strong pleas of equity and favour. On the one hand there are *bona fide* creditors, endeavouring to recover debts that are justly due; and on the other hand, the children of a lunatic, endeavouring to save a part of what he had fairly gained by a life of industry. In the strictest sense, therefore, both parties are struggling *de damno vitando*. Some blame was thrown on the conduct of the lunatic's relations, but I see no ground whatever for it. It is true that after the derangement of


David Paterson, they allowed matters to go on as formerly 1812. for several years. But I do not feel myself at liberty, in any case, to ascribe that to bad motives, which I can ascribe to good motives; and it does not appear to me, that Mr Paterson's wife and children, in refraining from any interference upon this subject, were guided by any considerations of advantage or disadvantage, or that such things ever entered into their heads. Their silence proceeded from the very natural feelings of delicacy, and from their aversion to bring the old man in any respect before the public eye. Such an imposition, even if it had been really practised, could not in any shape have availed the creditors; for as long as the recovery of David Paterson is a possible or probable event, it is his interest, and that alone which the law contemplates; and his interest ought not to suffer from any thing done, or omitted to be done, by his relations.

This is a petition for a recal of a sequestration. I conceive the grounds of it to be relevant, because it is alleged that there is no insolvency, and consequently no debt. I think we are called upon to enquire, and to see, whether there be *prima facie* evidence, with regard to the debts upon which the sequestration proceeds. The plea is, that they were contracted by a mandatory; that mandate expires by death, and that furiosity is equal to death. This doctrine is, no doubt, generally true; but the question is, whether it applies to this case, or leads to the inference, that there is no debt. With regard to that question, I certainly hold insanity to be equivalent to death. It is true, that death is more notorious, and the presumption may certainly be, that death is known where it

1812. would be that insanity is not known. But that goes merely to the question of the *bona fides* of the party. I hold, that furiosity itself must just have the same effect as death; indeed I think there is ground for the distinction drawn by the Lord Advocate, that insanity is a stronger case; because, in the case of death, the heir immediately appears to the world, while there is no person whatever to appear in the case of insanity. In answer to this it is said, 1st, That though a mandate expires by death, yet third parties, ignorant of the past and contracting *bona fide*, must be safe; and, 2^{dly}, That this is not merely the case of a simple mandate, but a *præpositura*,—that John Paterson was an institor; and farther, that the mandate was truly granted with a view to this very event of insanity. I cannot exactly subscribe to either of these propositions. In the case of a special mandate, I am not prepared to say, that the *bona fides* of a third party will be sufficient. Put the case, that David Paterson, when he went to London, in place of granting this mandate, had granted a mandate to sell the estate of Costerton, and that his son had proceeded to enter into a minute of sale, by virtue of this special mandate; I think it a matter of great doubt, whether David Paterson could now be compelled to implement that agreement; or if he had given a mandate to purchase, and the mandatory, after a lapse of years, had purchased accordingly, would the mandant have been bound to implement? I certainly think not. And in the case of special mandates, therefore, I cannot think that *bona fides* entitles the party to insist for implementation. The second plea is, That this mandate was granted by David Paterson, with a view to the very event which has happened; and that John Paterson was there-

by constituted an institor. But this certainly deserves a great deal more consideration. I cannot think, that the mandate was intended to enable the son to act during his father's insanity. It was naturally accounted for by what happened at the time; and nothing more seems to have been meant, than that he should attend to his father's business in his absence. Farther, I must beg leave to doubt, whether a party is entitled to grant a mandate to another, giving full power to manage his affairs in case of his insanity. The law then interferes to place the management in other hands, or, at least, it gives power to the relations, by the well known form of service, to undertake the management; and it is certain, that the powers of this or any other mandatory would be superseded, at any time, by the service of the tutor at law; but it would be a solecism to hold, that the greater power can be superseded by the less. I have great doubts, where a person is insane, how far his tutor can go on for a series of years, transacting effectually with all the world; and if a tutor cannot do so, much less can the mandatory. It is said, however, that the party here was an institor; and no doubt he was so. But still I doubt, whether he could bind the estate to third parties who were aware of the insanity. 1812.

It is very true, that this may not have been known; and I believe it was not known to some of the creditors. But circumstances may happen to render it notorious. Suppose, for instance, that David Paterson had committed murder; that he had been brought to the bar of the Court of Justiciary; that insanity were pleaded, and that, in the end, your Lordships had directed him to be taken

1812.  care of by his friends ;—Would parties have been in safety to contract with his mandatory ? For example, would the jurymen who sat upon his trial have been in safety to do so ? I conceive that, in such a case, they are *in mala fide*, or rather that their entire knowledge of the fact would, in the eye of law, have disqualified them from dealing with the mandatory ; and I hold, that this presumed *bona fides* is the foundation of all the authorities in favour of the great powers of the institor. They all proceed upon the implied *bona fides* of the parties, who believe he is acting for one of whom they know nothing, farther than that he has created such powers. The maxim *unusquisque debet scire conditionem ejus cum quo contrahit*, it is said, cannot be applied against the creditors. They see the institor placed in the shop, or warehouse, with all the ensigns of trust and authority ; and they are not bound to enquire farther. But if it is certain that they knew the powers of the institor to have ceased, their want of *bona fides* must instantly operate against them. Though neither of the pleas maintained by the creditors are good separately, I am of opinion, that both together are sufficient, viz. that some of them were *in bona fide* ; and that, in this case, John Paterson was acting as an institor. It is more just, that the loss should fall upon the mandant, not in consequence of any thing done by him in his insanity, but of an act of imprudence committed by him in sound mind, than upon the creditors, to whom no blame whatever is imputable.

At first, I confess, I was inclined to recal the sequestration ; but when we come to the consideration of that point, I think it is altogether impossible that we should

do so. This is not an allegation, that the debt does not exist, but rather that the value is insufficient. But unless it can be alleged, that no debts were due at the period when the sequestration was awarded, it must stand good. It is said, that there were only two debts due; and, at any rate, unless it can be alleged that no debt whatever is due, there is no pretence whatever for recalling the sequestration.

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There may be many questions still open to discussion in the ranking, as to the validity and effect of different debts. These questions may be attended with great difficulty; and I certainly do not mean, at present, to give any opinion whatever upon the subject.

LORD CRAIGIE.

The Judge who has now spoken, has delivered so clearly the opinion that I entertain, that it will not be necessary for me to trouble your Lordships at any length. The only point in which I differ from his Lordship is, that I conceive, in this case, John Paterson was not an institor. That person is truly made the master of the trade, and carries it on in his own name; now John Paterson was merely a mandatory, and that of a special kind. The only objects entrusted to him were the business of an insurance-broker and a banker. I do not conceive that he could have granted a lease, or sold the estate; and although I should not hold, that the procuration fell by David Paterson's return to Scotland, yet if the son proceeded in discounting bills after that period, I am of opinion that they are good for nothing. I do not

1812. think that the public can be held as ignorant of the procuration. There was nothing to hinder them to know of it. All those who held obligations signed per procuration of David Paterson, must be held to have known the whole conditions of it.

At present, however, the proper object of enquiry is, Whether the sequestration can be recalled or not; and I am quite clear, that it cannot be recalled.

LORD JUSTICE CLERK (BOYLE.)

This is a case of a very distressing nature, and, at the same time, of the utmost importance to the commercial interests of the nation, and we owe it both to the parties and to the country, not to withhold the opinions we have formed upon a subject of such moment. I shall not repeat what has been already stated, as to what I conceive to be the absolute bar to the recal of this sequestration; because, although there were some little doubt as to the debt in question, we cannot take it for granted that there are no other debts. Nay, we have been told, that there are at least two debts, which would of themselves have afforded a sufficient obstacle to the recal of the sequestration. But a general ground is stated for inducing your Lordships to cut down the whole proceedings, to restore the estate to the *curator bonis*, and to reverse every thing that has been done, viz. that the procuration necessarily fell to the ground, from the moment of David Paterson's insanity, and that all the subsequent transactions which followed upon it, are consequently void and null. I do concur in thinking that the bare discussion of such a question,

in this great commercial country, is an evil of the greatest magnitude, and that the question itself is one, which if not proved to be as clear as the sun at noon-day, ought not to receive the slightest countenance from your Lordships. Upon what ground is it maintained, that all these transactions are good for nothing. Down to the period of the failure of Paterson and Ker, this procuration was uniformly acted upon, received, and recognized in every banking-house in this city, with two trifling exceptions. But from 1805 down to 1809, not the smallest doubt seems to have been insinuated, that the actings of John Paterson were valid and effectual; the whole business in the house was conducted by John Paterson, and the world at large transacted with him, without the least doubt or hesitation; and when the procuration met with such general and implicit confidence in this city, was it wonderful that it should be acted upon by persons at a distance? The very statement carries upon the face of it an appearance of *bona fides*, which it is impossible to lose sight of. I have no doubt that there may be circumstances, with regard to particular debts, such as, where the parties knew of the insanity, knew that John Paterson was exceeding the powers and limits of the procuration, and yet dealt with him, in which the general rule may admit of exceptions. These are fit questions for the ranking, but it would be premature to give any opinion upon them at present. Notwithstanding, however, that no interference took place on the part of the family, and that every thing went on without interruption, until the failure of Paterson and Ker, we are now told, that mandates perish by the death of the mandant, that insanity is equal to death, and, consequently, that all transactions, without exception, must be con-

1812. sidered void and null, from the date of David Paterson's insanity. But if this is to be the case, things must be restored from the beginning, and broad as this rule is, there are equally clear exceptions from it, not only in the Roman law, but in the laws of all Europe. One of these I cannot possibly overlook, as it applies very strongly to the case of John Paterson, even if he had not been an institor, although I am perfectly clear that he was. It is laid down by Ulpian, that where a person is set over a particular branch of business, under certain restrictions, if such restrictions are not duly notified to the public, all transactions with him will be good, without regard to such restrictions, and, even though they are exhibited in writing above his door, still if they should be defaced by accident, or by the fraud of the *præpositus*, the *proponens* continues bound to third parties. Seeing this, and looking to the English opinions which are contradicted by no authority in our own law, I confess I have not a doubt upon the subject. As to the actings and authority of the mandatory they were known to the whole world. Intimation was particularly necessary in such a case, because no person could be ignorant of the existence of the procuration, seeing, as they did, cash accounts settled per procuration, and transactions of the greatest magnitude daily entered into and completed in the same manner, and John Paterson, in his whole conduct, identified with his father. Care was taken by the relations, that the situation of the old man should be little known. I do not mean to impute any moral blame to these persons; but they are certainly chargeable with indelicacy; and, at any rate, the world has nothing to do with this, as they were clearly *in bona fide*, as long as they were not certiorated of the true situa-

tion of David Paterson. Take the case with which your Lordships are too often conversant, and which arises from the dissolution of a mercantile company. We have all had access to know of the calamities which frequently fall upon families, where a person retires from a copartnery, but fails to give due and proper notice to the public that his interest in the concern has ceased, and the consequence is, that he himself or his family, at the distance of years, are frequently subjected in payment of the whole company's debts. Now where is the difference, in principle, between such a case and the present? Where a party has been once vested with a certain character, the world is entitled to deal with him upon the faith of that character, until he be divested of it by public notification. The world must be put on their guard, and interpellated from contracting with a person in such circumstances, otherways he or his constituent must continue liable; and precisely the same principle applies to the present case. I shall not enter into the circumstances of particular debts; as the only question before us at present is, whether we are to recal the sequestration, which I am perfectly satisfied we cannot, and ought not to do.

The Court then pronounced an interlocutor, refusing to recal the sequestration.

Counsel for John Pollock and the creditors, Clerk, Cranston, &c.; Agents, Gibson, Christie, and Wardlaw.—
Counsel for David Paterson and his *curator bonis*, Lord Advocate, Baird; Agent, Charles Stewart, W. S.

(SECOND DIVISION.)**THE CASE****OF****JOHN, DUKE OF ATHOL, AND OTHERS,****AGAINST****THE HON. WILLIAM MAULE OF FANMURE,****AND OTHERS.**

1812. **F**OR a number of years past, a remarkable change has been attempted in the established modes of salmon fishing in Scotland, by the introduction of a complicated machine, known under the name of a *stake-net*, the legality of which, and the right of particular heritors, to prevent its adoption, have been made the subject of very keen and obstinate litigation. The apparatus in question consists of an immense sheet of coarse net-work, with meshes of about three inches in diameter, stretched upon stakes fixed into the ground, at convenient distances, generally in rivers or friths, where the sea ebbs and flows, and extending either obliquely, or in a zig-zag direction, from high to low water mark. At various parts of this line openings are left, which lead into wide inclosures of simi-


lar net-work, and across the top of these openings a net is fixed, which, rising and falling with the tide, acts as a sort of valve to prevent the fish which have entered with the flow of the tide, from returning with the ebb. The inclosures, of course, vary in shape and extent, according to the nature of the ground, but their general form and operation may be conceived from the foregoing description. 1812.

The extraordinary success which attended this mode of fishing in the Frith of Solway, naturally led to its introduction in other parts, and particularly, between the years 1797 and 1800, the proprietors and lessees of the salmon fisheries along the coasts of the Tay, began to lay aside the fishing tackle previously in use, and to betake themselves to the new machinery. Similar effects were here found to attend the substitution of the new apparatus, in room of the comparatively ineffectual means formerly practised; and the result was a large and rapid increase in the produce of all the fisheries where this improved method was employed. The sudden gains of the proprietors of these fishings, however, were, from the beginning, viewed with considerable jealousy by the upper heritors, who, in fact, considered them in no other light than as a positive diminution of their own profits; and being advised that the use of stake-nets is contrary to law, as falling under the prohibitions of various Scotch statutes, against particular modes of fishing, they resolved to take measures for getting them suppressed by legal authority. For this purpose, in June 1799, a bill of suspension and interdict was presented to the Court of Session, on behalf of the Earl of Kinnoul, Lord Gray,

1812. and other proprietors and lessees of fishings, on the river Tay, against James Hunter, Esq. of Seaside, and the tacksmen of his fishings at Seaside, complaining of the mode of fishing by stake-nets, as illegal and injurious, and praying that it might be prohibited. Upon this application, however, an interdict was refused, but the bill of suspension was passed, to the effect of trying the question, and a declaratory action was soon after instituted upon the same grounds, concluding, that the mode of fishing by stake-nets was injurious to the upper heritors; that they had a right to put a stop to it, or any other mode of fishing not previously used in the Tay, and that Mr Hunter ought to be ordained to remove and demolish the works complained of, and prohibited from erecting any such in time coming.

In this action, judgment was given by the Court of Session in favour of the pursuers, or, in other words, against the stake-nets; and, upon appeal to the House of Lords, the judgment was affirmed.

This decision was considered by the upper heritors as a conclusive sentence upon the general point, regarding the legality of fishing by stake-nets, and they attempted to apply it as a rule for all the other fisheries along the coasts of the Tay, however differing in local circumstances, from the fishery of Seaside. For this purpose, they presented bills of suspension and interdict against all these fisheries, founding upon the case of Seaside as an authority for the regulation of other cases, and praying that the use of stake-nets should be prohibited in every instance complained of. Excepting in one case,

however, the interdicts were refused, and this decision 1812.
was also affirmed, upon appeal to the House of Lords. 

The upper heritors then brought a regular action of declarator, against all the proprietors of salmon fisheries along the frith of Tay, setting forth, that by the common law, no proprietor of salmon fishing is entitled to exercise his right, otherwise than by net and coble, where the tide ebbs and flows, or in some mode sanctioned by immemorial usage; and, that by various acts of the Parliament of Scotland, the taking of salmon in waters where the sea ebbs and flows, by means of cruives, yairs, or other machinery, is prohibited. But, that nevertheless, the Right Hon. George, Lord Kinnaird, the Hon. William Maule of Panmure, and a variety of other persons, proprietors of salmon fishings upon the Tay, had erected yairs or stake-nets, or other machinery of the nature of yairs, upon the sands opposite to their respective estates, between high and low water mark, to the destruction of the salmon, as well as of the fry of salmon and other fishes, and to the great hurt and prejudice of the upper heritors; and, therefore, concluding for a decree, finding that the defenders, the lower heritors, had no right to erect or use the yairs, stake-nets, or machinery complained of, or other machinery of the same nature; ordaining them to demolish and remove their machinery, to pay L. 20,000 of damages for the time past, and L. 5000 yearly in time coming, as long as they should continue to use the stake-nets, and prohibiting and discharging them from again using them under suitable penalties.

In defence to this action, it was pleaded for the lower

1812. heritors; 1st, That the pursuers had no title to insist in the action; 2dly, That the mode of fishing practised, was not illegal, nor prohibited by any act of Parliament; and, lastly, That the acts of Parliament founded on, do not extend to fishings locally situated in friths, or in the sea.

This action having come before Lord Polkennet, as Lord Ordinary, his Lordship, after some proceedings, allowed the parties a proof of the facts respectively averred by each; which having been taken and reported to the Second Division of the Court, their Lordships, after directing some farther investigations, appointed counsel to be heard in their own presence upon the whole cause.

Counsel were accordingly heard for several days. The grounds of the action were laid not only upon the common law, but upon various acts of Parliament prohibiting cruives, yairs, and other machinery; particularly an act of the first Parliament of James I., passed in the year 1424, entitled 'of cruives and yairs and Saturday's slap;' the act of the tenth Parliament of James III., passed in the year 1477, entitled 'anent cruives;' the act of the first Parliament of James IV., passed in the year 1498, entitled 'anent cruives;' and the act of the ninth Parliament of Queen Mary, passed in the year 1563, entitled 'anent cruives and zairs;' and a variety of other acts of the same nature.

To this action the defences involved three questions: 1st, The question of title; 2dly, The illegality of the stake-nets; and, 3dly, How far the statutes applied to any fishings situated in friths or the sea. The arguments of


the parties may be conveniently stated under these several 1812.
heads. Upon the first point, it was pleaded for the de-
fenders,

I. The pursuers have no *title* to insist in this action, nor in any action under the statutes for having stake-nets suppressed as illegal, in respect that any such right of action is conferred upon the public prosecutor; that the offences are wholly of a public nature; that they are declared to be points of dittay; and that all jurisdiction in that behalf is vested in the Sheriffs, and other public officers of the Crown. No right of action is given to individuals; and in so far, therefore, as certain proprietors of fishings in the Tay simply assert, that stake-nets are prohibited by the statutes, it is enough to answer, that these individuals are not entitled to assume the functions of public prosecutor, or to denounce any practice as an offence against the public law.

They have indeed alleged, that they have a patrimonial interest in suppressing stake-nets; and this they endeavour to make out, in the first place, by resorting to the hypothesis of a common property, which, they say, resides in the various proprietors of fishings upon any given river, all of whom, they seem to imagine, are in some sort bound to each other, like members of a corporation; insomuch, that no individual of the body can obtain or appropriate to himself a larger share of the joint subject than he has enjoyed by immemorial usage. But this is quite visionary. No trace of such an idea as that of a common property, is discoverable in any Crown grants of salmon fishing, nor in any of the numerous statutes passed upon the subject; the sole object of all which has been,

1812. to establish regulations of a public nature, with a view to the preservation of the breed of salmon, but which leave the rights of individual proprietors precisely as they stand under the Crown grants. *Secondly*, It is said, that the stake-nets are injurious to the pursuers' interest, by taking a great quantity of salmon, and destroying the salmon fry. But, as to taking a great quantity of salmon, this is not an injury of which the pursuers are entitled to complain. They ought to show, that the stake-nets are necessarily and directly injurious to their fishings. It is not enough merely to say that they are beneficial to other fishings; nor are the pursuers entitled to assume, that the gain of the lower fisheries is synonymous with the loss of the higher; and, even if it were true that the latter fisheries have been less successful since the introduction of stake-nets than at some former period, this can never be held as proof that the decrease has been occasioned solely by the stake-nets; for it is well known, that all salmon fisheries are subject to the most striking fluctuations of produce, whatever may be the skill, industry, or capital, employed in the business. Some positive and permanent loss, therefore, ought to be traced home by the pursuers to the direct operation of the stake-nets, and not attempted to be deduced from the inconclusive fact of the improvement of other fisheries; for, if they are entitled to complain of any given contrivance, merely on account of its success, the statutes must become a standing interdict against skill and ingenuity, and the country must be condemned to the use of an inefficient apparatus, for no better reason than because of its inefficiency.

To say that the stake-nets occasion the destruction of

the fry of salmon, is an absolute mistake ; as it is clearly 1812.
 proved, that, since the first erection of these machines 
 in the Frith of Tay, not a single fry of salmon has been
 caught by means of them ; and indeed it is evident, from
 the nature of the thing, that no fry of salmon can possibly
 be caught in these nets ; because it is well known, and is
 clearly proved, that as soon as the fry are disengaged from
 the spawn, which takes place early in the spring, they
 proceed downwards from the higher branches of rivers
 to the sea, and, in their passage, are invariably seen to
 avoid the middle, where the current is strong, and to
 keep among the easy water near the margin. But, as
 soon as they reach that point of the river where the in-
 fluence of the tide begins to be felt, they stop for some
 time, until they be habituated to the salt water, and then
 plunge into the deep current in the middle, which is there
 comparatively tranquil, and are no more seen. But it is
 far below this part of the river at which the salmon fry
 regularly disappear, that the stake-nets are placed ; and,
 consequently, the impossibility is evident that any of them
 can be caught by these nets.

But indeed the pursuers have totally failed to show, that
 there has been any permanent or regular diminution of
 the produce of their fishings since the introduction of the
 stake-nets, or any variation, even from year to year, great-
 er than what may be reasonably expected in a concern
 subject to such unaccountable fluctuations, and in which
 it is impossible, with reference to any given year, to say
 whether it may yield half of what preceded, or may not
 produce double of what is to follow it. Besides it is clear,
 from the evidence of experienced fishermen, that the sale

1812. mon caught in the stake-nets, are not in their progress to the fresh water part of the river, where the pursuers' fisheries are situated, but have been thrown in upon the low shelving sands with the rise of the tide, and, if not taken by the stake-nets, would have returned to the ocean with its fall. In short, the pursuers have not succeeded in showing, that their fisheries have been permanently unproductive since the use of the stake-nets began, and still less have they traced any decrease in that respect to the operation of these engines. They have failed to qualify any sufficient interest, and have consequently no title to complain of any breach of the statutes, real or supposed.

Answered for the Pursuers.—Supposing it were true, that the preservation of the breed of salmon was the sole object in the view of the Legislature, in passing the various statutes for regulating the salmon fishery, still, as it must be admitted that every proprietor is deeply interested in repressing all practices tending to the destruction of the breed, which are just so many encroachments upon his own grant, it follows, that he has an undoubted interest and title to complain of them, and to seek redress in a court of law. But the object of the statutes was, not merely to lay down positive rules for the preservation of the breed of salmon; because there are a variety of regulations, such as those connected with the mid stream and the Saturday's slap, which have no reference whatever to the preservation either of the red and black fish, or of the fry. The policy of these laws could be nothing else, than the prevention of any monopoly on the part of one set of proprietors, at the expence of the rest—a state of things for which the migratory habits of the salmon, in passing

from and returning to the sea at stated periods, give peculiar facilities, and which it was absolutely necessary to guard against, if, by grants of salmon fishing, the Crown really meant to confer a substantial benefit, and not the mere mockery of a gift. In the same manner, therefore, that the river itself is considered as a common subject, of which all may take the use, but none the monopoly, and as each is bound to refrain from any operation which would destroy or abridge the right of the heritor immediately below him; so, in a salmon fishing, the shoal of fish, either in its progress to or return from the sea, is to be held as a joint property, which must be protected for the benefit of all, from the rapacity of a few of the grantees. The proprietor who complains of stake-nets, or of any similar engines, is not assuming the office of public prosecutor, but vindicating a matter of clear patrimonial right; and besides, the concurrence of the public prosecutor is not required in any complaint upon the statutes, unless where a penalty is concluded for; and that is not the nature of the present challenge, which differs in no respect from many others which have been sustained at the instance of private individuals, upon no other title but an infestment of salmon fishing in the river where the trespass occurred.

Equally clear and indisputable is the interest of the pursuers to insist in the present challenge; for although it were true (which it is not) that no red fish nor fry are destroyed by the stake-nets, and that the produce of the pursuers' fishings has not been diminished since they were erected, this is not enough to warrant the inference, that the pursuers have suffered no injury from the stake-nets,


1812. because, in such a case, it would be impossible to say, what circumstances might concur, with favourable seasons, to keep up the average produce of the fisheries in spite of these machines. They have existed but for a short time upon the Tay, and owing to their irregular increase from year to year, the temporary suspension of some of them, and the total suppression of others, added to the unaccountable variations in the annual produce of all salmon fishings, it is impossible to form any certain calculation with regard to their ultimate effects. Frosts and floods often destroy the spawn deposited in the shallows, the consequences of which cannot be felt for years. In a dry season the fish have not the same means of ascending the river, and are, consequently, less numerous; and, in like manner, when porpoises abound upon the coast, the fishery is much deteriorated, as they are the most formidable enemies of the salmon, and have often been observed to pursue them into the nets, and even to tear them out when entangled. Joined to all these causes, many others that are unknown must contribute to diminish the produce of salmon fisheries, as it has been justly remarked, that we know less of the natural history of fish than of any other kind of animal.

But the uncertainty of the subject lies much deeper, and, indeed, in no part of it does it present any fixed data for calculation. In so large a river as the Tay, it is impossible to discover what proportion the number of fish caught, in a given season, bears to the number that actually enter it from the sea. If the season threatens to be unproductive, the lessees of the fisheries employ more boats, nets, and hands; they fish during the ebb and flood, and,

by reliefs of men, persevere night and day. In these cir- 1812.
 cumstances, the quantity of fish caught by the pursuers
 for ten years, before and after the introduction of the stake-
 nets, affords no criterion for ascertaining their precise ef-
 fect, or the slightest reason for holding, that they might
 not ultimately diminish and even extirpate the breed; and
 hence a judgment, disallowing the pursuers' interest, in the
 present action, unless they can shew that the produce of
 their fisheries has recently declined, would proceed upon
 grounds the most fallible and imperfect. But, besides all
 this, there is positive proof, that the stake-nets are de-
 structive to the fry of salmon; and the pursuers have es-
 tablished, by the clearest evidence, a permanent diminu-
 tion in the produce of their fisheries, and a consequent fall
 in their rents, ever since the stake-nets were introduced.

II. Upon the *second* question, which regards the legali-
 ty of the stake nets, it was pleaded for the defenders:—

From an attentive examination of all the statutes that
 apply to the salmon fishery, it is clear, that they are re-
 gulations altogether of a public nature, and in no respect
 relating to the rights of individuals, except in so far as
 these may be involved in the general good; and the objects
 in view, seem to be no other than the preservation of the
 breed of salmon, by securing to the unspawned or red fish
 an undisturbed access from the sea into the rivers, and to
 the fry and smolts a safe passage from the rivers into the
 sea. What affords demonstrative evidence of this is, that
 all the mechanical devices, prohibited by the Legislature,
 such as *cruives*, *yairs*, *prynns*, *coups*, or by whatsoever name
 distinguished, have this common character, that their struc-

1812.  ture and local position were such as to present a barrier against the passage of fry and smolts from the rivers into the sea. But in as far as the effect of these machines was merely to intercept grown salmon, in a healthy state, in whatever quantities, it was no part of the policy of the statutes to prevent an object so advantageous to the public; nor, in this respect, do they recognise any legitimate interest of individuals, in opposition to the direct and important interest of the community. Now it has been already seen that the stake-nets never can, by possibility, intercept the fry, since, besides that they are wrought on a mesh of three or four inches in diameter, and so leave a free passage, they are placed far below the point where the fry disappear. Neither can they ever interrupt the black or red fish, because they are always removed in forbidden time. But, not only are they without the intent and meaning, but even the literal words of the statutes; for stake-nets, confessedly, bear no resemblance to cruives; they are essentially different from yairs, which are close dikes or pallisadoes, affording no passage to the fry, and they do not answer to the description of any other prohibited engine.

Answered.—As formerly observed, it is a mistake to represent the sole object of the Legislature, in regulating the salmon fishery, to have been the preservation of the breed of fish, as there are various institutions, such as the mid stream and Saturday's slap, which could have no other object in view, but to protect the relative rights and interests of the whole body of fishing proprietors. In the spirit of this policy, the Court has repeatedly found, that any impediment placed across a river to deter or prevent

the fish from ascending, is an illegal device, to enhance the produce of a fishery, because it gives one heritor an undue advantage over others in the use of a common property. Upon any other view, the prohibition of cruives or yairs would have been absurd, because a cruive of the statutory description cannot catch a single fish in close time, nor intercept a smolt at any time; and if yairs were constructed with interstices of a proper size, to admit fish in close time, they would be equally harmless. Accordingly it is remarkable, that the statute of Robert Bruce, which is expressly made for the purpose of preserving the fry, does not order the demolition of cruives and yairs, but merely regulates the size of their interstices. In short, it is impossible to reconcile many of the most important rules of the statutes to any other view than that of preventing a monopoly, by securing to each grantee a fair participation of the joint subject. It is of no importance that stake-nets are not prohibited *nominatim* by the statutes, because a variety of devices, all of which consist in some form or other of an inclosure to catch fish, are prohibited; and it admits of no doubt, that, under these prohibitions, a stake-net must be comprehended as being the most effectual and destructive inclosure for catching fish ever yet invented.

III. Upon the third question, regarding the effect of the local situation of the stake-nets, it was pleaded for the defenders:—

The statutes are expressly limited in their operation to rivers, in contradiction to the sea, friths, and bays; the obnoxious machinery is prohibited only in waters where

1812. *the sea ebbs and flows* ; or, in other words, rivers, or that part of them between the point where the influence of the sea is first felt, and the point where it is continually ebbing or flowing ; and, as the fishings of the defenders are not situated in any river but in a frith of the sea, it follows that they are without the reach of the statutes. That, in point of fact, they are so situated, is evident from ocular inspection, agreeing in this respect with the testimonies of topographical writers, who uniformly denominate the Tay, opposite to Dundee, not a river but a frith ; and although it may be sometimes vaguely termed a river, in common speech, this can never have the least weight in a question like the present. It is not for the defenders to determine the exact point at which the sea ends, and the river begins ; but, upon this subject, they had recourse to the assistance of a professional gentleman, who, after a careful examination of the comparative weight of the different *data* for solving this problem, and a series of judicious observations, determined the mutual boundary of sea and river to be the confluence of the Earn and Tay, being the centre point between Friarton, the highest part where the tide is continually ebbing or flowing, as well as the common section of the surfaces of sea and river, and a line from Errol Dike, across the frith, to the stone above Bambreich Castle, where sea ware ceases to grow.

It happens, by a striking coincidence, that the point thus determined by philosophical observation, is the very spot where the fry first disappear, in their downward passage to the sea ; and this adds the force of demonstration to the defenders' views of the policy of the statutes.

Answered.—The new theory, suggested in 1810, for 1812.
fixing the mutual limits of the sea and river, may or may {
not be solid ; but, before it is adopted by the Court, it is
deserving of consideration, whether the Scotch Parlia-
ment, from the reign of Alexander II. to that of James
VI., really intended to make any distinction between a
frith and a river. Their prohibitions are directed against
fixed machinery in waters where the sea ebbs and flows ;
but it is well known, that *flumen*, *fluvius*, or *aqua*, in Latin,
a *river* in English, and a *water* in Old English and Scotch,
do not exclusively denote a fresh water stream, but apply
to every stream from its source to where it falls into the
main ocean, including the whole æstuary, (where it forms
an æstuary), that is the whole arm of the sea, *intra fauces*
terræ, as contradistinguished from the main ocean. It is
not very likely, that the laws of the old Scotch Parlia-
ment should have been influenced by a fact, discovered
through the medium of a learned process by mathemati-
cians of the nineteenth century ; and as to any fancied
coincidence between this result and the policy of preserv-
ing the breed of fish, the supposition is to the last degree
improbable. If the Legislature had nothing in view but to
preserve the fry by interdicting the use of engines in the
brackish part of the river, where they are said to linger
until they are accustomed to the new element, why
should they include, under this interdiction, the whole
space between the highest influence of the sea and the low-
est influence of the river ? In the Tay, this space extends to
five or six miles, for only one of which at most the water
is brackish ; and for what purpose, therefore, should the
prohibitions be made to comprehend miles of fresh water,
where the policy of the law could have no influence ? All

1812. this, however, proceeds upon the hypothesis, that the salmon fry have the habit which is ascribed to them; but, even if this were clearly ascertained, it is not alleged, that the fry of sea fishes have the same habit; and, as the statutes had the preservation of these expressly in view, as well as that of the salmon fry, it cannot be denied, that to this extent, at least, the stake-nets fall under the statutes; as it is well known, that the fry of sea fish rarely ascend into the fresh water, but are bred in creeks, havens, and the shores of æstuaries. In short, the defenders have offered nothing but a gratuitous and inconclusive theory, to controul the express words of a body of statutes.

After hearing counsel, the Court appointed the case to be stated in memorials; and upon advising these papers, on the 7th March 1812, their Lordships proceeded to deliver their opinions as follows :

LORD GILLIES.


This is a case of singular difficulty and importance, in which I labour under the additional disadvantage of endeavouring to get quit of the impression which I received as a counsel in the case. It has been very fully debated at the bar, and is now stated in papers of extraordinary learning and ability. In considering these with all the attention in my power, it appears to me that the questions at issue are three in number : 1st, Whether the pursuers have made out a good title to insist in the present action? 2dly, Whether the statutes on which they found, apply to engines such as stake-nets are described to be?

for whether they have a title or not, still the question is, 1812.
 whether the statutes do apply to these engines; and un-
 less the pursuers can shew that they were meant to apply,
 and do apply to such engines, it is of no consequence
 where they may be placed. *Lastly*, The third question
 is, whether the statutes apply to engines of any descrip-
 tion situated as these nets are? The first point is the
 question of title, and this involves the question as to the
 policy of the statutes. It is maintained by the defenders,
 that the object of these enactments was altogether of a
 public nature; that they are mere regulations of police,
 and can only be enforced by the proper officers to whom
 the superintendence of the police of the country is com-
 mitted. On the other hand, it is maintained, that the ob-
 ject was not merely to enforce regulations of police, but
 to protect the property of the superior heritors; and it is
 said, that the salmon in a river, are a species of common
 property; that the king having made grants to various
 persons, it must have been the object of the Legislature
 to protect those grants. If I were to confine my consi-
 deration of the title to these two points, viz. whether it
 was the object of the statutes to protect what the pur-
 suers term common property; or, on the other hand, to
 enforce regulations of police, I should say that the pur-
 suers have no sufficient title; for it is clear to me, that
 no such idea as that of a common property had ever oc-
 curred to the Legislature. The object of one and all of their
 enactments, is to protect the breed of salmon for the benefit
 of the community, and without any view to the interests
 of one class of heritors more than to those of another. The
 acts are annexed to one of these papers, and certainly,
 from the first to the last, the object is plainly avowed to

1812. be the general and public one, of protecting the breed of salmon; as a principal means of doing which, they prohibit the catching of red and black fish, and the destruction of the fry. When it is said by the pursuers, that the object of the statutes was to protect this supposed common property, your Lordships will not find that in any one act is there the smallest allusion to that which is alleged to have been the main object of the whole of them. There is no allusion to it. They indeed state, that such was the object, but, from beginning to end, the statutes are utterly silent upon it; and the natural inference is, that they had in view that object which they express, and not that to which on no occasion do they allude. The first statute is one of Robert I., and the intention of its provisions is distinctly stated, ‘*ita quod nulla fria piscium impediatur ascendendo, sed quod libere possunt ascendere, vel descendere ubique.*’ Then comes the regulations of James I. ‘*Item, That all cruvis and yairis set in fresche watters, quhair the sey fillis and ebbis, the quhilk destroyis the fry of all fischeis, be destroyit and put away for ever mair.*’ What am I to consider as the object of abolishing these cruives and yairs? What could be the object, but to prevent the evil which is expressly stated to result from them, viz. that they destroyed the fry of all fishes. This leads me to notice an argument, that the fry could never be destroyed by cruives; and consequently that the object of the statute, in abolishing cruives, could not be to prevent the destruction of the fry. But even though this were true, that cruives can do no injury to the fry, this would not bear the pursuers out in their argument as to the policy of the acts, because the Legislature expressly declares, that they are destructive

to the fry. They may or may not be so, but the question is, Whether the Legislature had it in view to prevent the destruction of the fry; and it is necessary for the pursuers to make out, not merely that *de facto* they were not injurious to the fry, but that the Legislature were not of opinion that they were injurious to the fry. But how is this possible, when the Legislature expressly sets out with declaring that they are so; and it is clear, that their policy and views must be judged of by their own acts. The next statute is in 1478; in which it is expressly declared, that these engines destroy the fry of all fishes. *Lastly*, There is the act of Queen Anne, which I think contains complete proof that such was the main, if not the sole object of the Legislature. It begins by ratifying all the previous acts, and stating the great and many advantages that may arise to this nation by encouraging the salmon, white and herring fishings, &c. ‘ And albeit there be several good acts already made, to encourage and carry on that trade, yet they are either in desuetude, defective; or do not answer the present circumstances; therefore her Majesty, with consent foresaid, ratifies and approves all former laws and acts of Parliament, made anent the slaying and destroying of red fish, smolts, and fry of salmon.’ This is considered to be a sufficient enumeration of these acts; and what was the view of the Legislature at the time? It was, that they were acts meant to prevent the slaying and destroying of red fish, smolts, and fry of salmon. Upon these grounds I cannot have a doubt, that the pursuers are wrong in their proposition that it was any part of the object of the Legislature to prevent inferior heritors from monopolizing the salmon. They meant to preserve the breed; and not only con-

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1812.  ceive that such was their object, but that neither in point of justice or expediency could they have had any other object. In the first place it would have been inexpedient to prevent salmon from being caught in the greatest possible quantity, and the nearer the sea the better, as the fish are there most likely to be in a good and firm state. In the next place, it would have been unjust to deprive inferior heritors of the natural advantages arising to them from their actual situation. Many such advantages there are, and they are inseparable from property. One man has an estate near a sea-port, or adjoining a great turnpike road, and he has benefits thence arising which place him in a better situation than the generality of his neighbours. In the same way where a person has a salmon fishing, his property is enhanced in value by it, and where it is near the sea, the property is still more enhanced than if it were situated far up the river. All these are adventitious benefits, resulting from natural situation. Such are the benefits enjoyed by the lower heritors in the present case, and it would have been a most absurd and unjust policy, if the Legislature had intended to prevent them from catching as many salmon as they could. Your Lordships will observe, that I am always assuming that it is by fair and legal means, because I know the pursuers say that it was the object of the Legislature to prevent all fishing except by net and coble. On the other hand, I say that such was not, and could not be the object of the Legislature. But while I state this as my opinion, still I think it follows, that if the pursuers can show that these are illegal engines, and that these engines are attended with injury to their property, they have a title to insist that they shall be removed. This title


is not founded on their illegality, because that is a matter which clearly belongs to the public prosecutor. But every person is entitled to have an illegal structure removed if he can shew that his property is injured by it, and therefore their title depends on their ability to qualify an interest. If they can shew that these engines are illegal, the question is, whether they are injurious to their interest. This leads to a consideration of the proof; and I must confess, that after paying all the attention to it in my power, I have not been able to form a very clear opinion upon the subject. If it be stated generally, that by means of these stake-nets a smaller quantity of fish ascends the river, that is extremely probable; but we have no proof of the fact; for, from the manner in which the proof has been conducted, we cannot see with certainty that these fishings are injured. I believe them to be injured, because it is so probable; and therefore I am for sustaining the title, not on account of the proof, but from the natural and reasonable presumption, that these stake-nets are attended in a certain degree with injury. I wish it had been proved in a more satisfactory manner; but still I think it sufficiently appears that they are injured to a certain extent, and therefore I am clear that the pursuers are entitled to have the stake-nets removed if they can shew that they are illegal.

This leads to the second question, Whether the statutes do or do not apply to engines of this nature; and if I have stated the main objects of the statutes correctly, viz. that it was to prevent the destruction of the fry and red fish, it follows, that it never could be the intention of the Legislature to prevent the catching of as many

1812. fish as possible in a healthy state, provided this was compatible with the preservation of the fry and red fish. A great many decisions are quoted, in which stent-nets have been found illegal; but these are materially different from stake-nets; and it appears to me, that the ground on which stent-nets have been found illegal, is, not that they catch fish, but that they prevent fish from ascending the river; and I am the more confirmed in this by the case of the Duke of Queensberry. The species of engine which prevents fish from ascending the river without catching them, is prohibited by the Legislature, and has been found illegal by these decisions. But, do these apply to stake-nets? I conceive they do not. The object of a stake-net is to catch fish; it is used directly as the means and instrument of catching fish. It is said, that a few of the fish may be prevented from ascending. But, in this way, fishing by net and coble might be proved to be illegal, because that certainly cannot be done without frightening away some fish. But I allude to the main and primary object of these engines. They are altogether different from cruives or yairs, and they are also different from stent-nets; because the object and effect of all these was, not to catch fish, but to prevent fish from going up the river. It does not appear to me, that these engines can be considered as prohibited by any of the statutes. They are quite different from cruives, and different from yairs. It is pointedly said that they have the same effect with yairs; but they have not the effect in consideration of which yairs were prohibited by Parliament—that of destroying the fry. It is for that reason that they were prohibited, and it is in that very respect which occasioned the prohibition that stake-nets materially differ, because they

neither do nor can prove in the slightest degree destruc- 1812.
tive to the fry. I shall not enter into the etymology of the different terms used. We do not know their exact nature, but it was known to the Legislature at the time; and the effect ascribed to all these different engines was, that of destroying the fry. I therefore conceive, that the pursuers have not made out their second ground, that these engines are illegal.

Upon the third point, I fairly own that I have had less difficulty. I am clearly of opinion, that the statutes do not apply to engines of any description erected in the situation of these stake-nets. The words of the acts certainly bear, in 'fresh waters,' in one instance,—'waters,' in another,—and 'salt waters,' in a third. But, upon this subject, I go entirely with the reasoning of the defenders' memorial. The statute of Robert I. states—'Item, 'omnis illi qui habent croias, vel piscarias, seu stagna, 'aut molendina in aquis ubi mare ascendit, et se retrahit.' The next states, that they were not to be placed where the tide ebbs and flows, which is just a translation of the former; and the question is, what it applies to. It does not apply to a situation within the influence of the tide. Does it extend to the sea itself? That is not maintained. But it is said that it applies to all friths, however extensive. I really think this would have been a very odd innovation, if it had been introduced by the Legislature; and it appears to me, that the very words of the acts of Parliament afford demonstrative evidence of a contrary understanding. The engines first mentioned, and the erection of which is prohibited, are cruives and yairs. It is said, that all cruives and yairs set in fresh wa-

1812.  ter, where the sea ebbs and flows, shall be destroyed. Now, here your Lordships will observe, that the act speaks of cruives and yairs as engines of a similar nature, and certainly as erected in the same place. The act is directed to a situation in which it was common to place cruives and yairs. But, how could it be intended to prevent these erections in the water of Tay? It would have been doing a very idle thing to have prohibited the erection of a cruive-dike across the Tay. In fact, if you look at the phraseology of the statutes, it is clear that they were not meant to apply to such situations at all, but were limited to those parts of rivers where the sea ebbs and flows. The Legislature may not have been able to distinguish, so accurately as men of science, where the precise point is; but their inability to do this, does not lessen the respect which your Lordships are bound to show to their intention; and if they had really meant that the regulations should apply without limitation to friths, they would certainly have said so in some one or other of the statutes. But, in no one act of Parliament founded on, does it appear that they had any such intention. The situation of these engines is uniformly described to be in waters, in fresh waters, in salt waters, or waters generally, where the tide ebbs and flows. It is impossible to hold, that if they had intended this to apply to friths in the sea, they would not have said so. They could not, indeed, distinguish the point where the river ceases, but their object was to confine it to that point; and surely this is still more made out, when you find that, from the result of actual experiment, it was at this point alone that the policy of the Legislature could have any operation; for it appears from Sim's evidence, that it is only at this point

where the erection of such engines could be attended with 1812.
any injury. The Legislature were perfectly well in-
formed with regard to those parts of the river where in-
jury was most to be dreaded; and when you find the ex-
pression which they have given of that part of the river
admits of the construction which reconciles it to the po-
licy of the law, it is impossible to refuse due effect to it.

There is another fact, which is not so distinctly stated,
nor so much dwelt upon as might have been expected;—
I mean, that there are many yairs 'erected in different
friths, many grants of yairs, one of them in the Frith of
Clyde, in favour of Graham of Gartmore, another be-
longing to Mr Dennistoun of Colgrain. When were these
grants made? Can your Lordships suppose, that, at a
time when any of these acts was *in viridi observantia*, the
Crown would give grants of yairs that were totally ille-
gal? When these grants were made, the acts of Parlia-
ment were fully known, and, in fact, better known than
they are now; and yet, in the face of these statutes, va-
rious grants flowed from the Crown, giving right to yairs
in the Frith of Clyde.

It appears to me, that a very strong argument arises
from the act of King William, which speaks of pock nets,
and other illegal engines, and prohibits them from being
used above the Pow of Alloa. Would it have been thought
necessary to prohibit that mode of fishing, if there had
been existing acts to reach it? They certainly would not
have prohibited that, or any other mode of fishing, if it
was already illegal. But the act prohibits a certain mode
from being used above the Pow of Alloa. Why? Be-

1812. cause, without such act, the fishing might have been lawfully used. These are the grounds of my opinion. I conceive the pursuers have a sufficient title. I have great doubts how far the regulations apply to stake-nets, and I am clear they do not apply to any engines in a frith. I do not enter into subordinate questions. Many of the individuals are in particular situations; and if your Lordships hold that the regulations do apply to a frith, and not to the sea, you have still to determine where the sea ends, and the frith begins. I think the point is accurately drawn by Mr Jardine.

LORD WOODHOUSELEE.

This is a case of great magnitude and patrimonial interest, and of deep importauce in itself, as it involves the construction of the general enactments of the Legislature, respecting an object which, from the earliest periods, has always been held to be of very high moment—the exercise of the right of salmon fishing. As these valuable rights were the subject of frequent disputes, which led to invasions on the part of the greater landholders, on the one hand, and to improper practices on the other; so it became necessary, for repressing all such proceedings, that the Legislature should interfere to regulate the exercise of these rights. These appear to me to have been the motives for the framing of the various statutes upon this subject; and the same motives appear to have been the occasion of the later acts following out the same wise ends, viz. the security of landholders in the exercise of their just rights, and the protection of all heritors of salmon fishings against invasion, by improper modes of fishing.

It is argued by the defenders, that the purpose of all these statutes was entirely of a public nature, and had no respect to the private interest of individuals; and, in evidence of this, they appeal to the various enactments, which, they say, have no other end but the preservation of the breed of salmon. Now, I would ask, what they mean by the public? Does not the public consist of individuals? Or, will any one assert, that the security of private rights of property is not the main concern of the Legislature? There seems to be here a sort of metaphysical distinction attempted, where there is not a real difference. I hold the objects of the statutes to have been, mainly, the maintenance and protection of such heritors as had rights of property, the securing them from all invasion by any one heritor or another, and the prevention of ruinous and destructive modes of fishing. I therefore cannot enter into the distinction between the public interest in the preservation of the breed of fish, and the private interests of individuals. Every individual heritor of salmon fishing has a direct interest to appear. The preserving of the breed of fish is his direct interest, and he requires no aid from the public prosecutor in vindicating this right. But the express object of the Legislature was, to secure patrimonial rights; and one of their chief objects was, to prevent a monopoly from being grasped at by a few individuals.

This is quite evident from the regulations relative to the mid stream and the Saturday's slap; the main purpose of which was, to prevent a few heritors at the mouth of the river from monopolizing the produce of the fishings. The defenders say, 'No; it was to preserve the

1812. breed of fish. I say the question is the same; the object was to keep down the monopoly. These regulations had no direct reference to the encouragement of the breed of fish: the mid stream did not need to be six feet wide, to let the salmon fry pass through it. It is plain that these two regulations had no reference to the specified object of preserving the breed, but that their purpose was, to restrain all monopolizing attempts of a few to make an exorbitant gain at the expence of others; and this principle was expressly recognized by the Court in the case of the Earl of Fife against Gordon, where there was a net stretched across the river, and people employed to drive the fish into it by means of spears and other weapons; the purpose of all which was, not to scare the salmon, but to give one heritor an exorbitant gain to the prejudice of another, who had just as good a right as he had. In short, the object of the statutes is, to repress all the modes of catching fish by every sort of standing machinery, and to prevent a most unjust monopoly by any set of heritors. Yairs are expressly prohibited; and what is a yair? The meaning of a yair is just an enclosure. These were formerly made of wicker-work, and composed a most destructive engine. But, it is said, a stake-net is altogether different, and cannot intercept the small fry. But if the work used is similar to a yair, without reference to its materials, I confess I cannot see that it is of the smallest consequence of what materials it is made, provided it be a standing machine that catches fish. It is said that it is tied by a twisted cord. It is of no consequence; it was the engine, the machine itself, which the law intended to put down; and the question is just, whether the law be still in force. I confess I have no doubt

it is. The only difference between a stake-net and a yair 1812. is, that the one is ten times larger than the other; and the argument just seems to be, that an enclosure of twenty feet diameter is not prohibited, while, on the other hand, an enclosure of half the size, or less, provided it is made of ropes, is prohibited. But it is clear, that all machines are prohibited. The act mentions a variety of them; and, in short, it is the anxious view of the statutes to put down, as illegal, every species of fixed machinery; and the description is so comprehensive, that no machine of that nature can be held as not included in it.

As to the situation, I must observe, that I cannot believe that the Legislature had it in view to make any distinction between the precise part of a river where engines were prohibited, and other parts where they were not prohibited. The defenders maintain, that there is a marked difference between the river and the sea. But this is founded upon subtleties which I have not been able to enter into. These may be creditable enough to the defenders' ingenuity; but, in my apprehension, their ingenuity, and their novelty, are decisive against their application to the present case; because, being thus new and ingenious, they could not possibly have been in the view of the Legislature at the time. When they were prohibiting the use of yairs, they had not the smallest idea of settling the precise boundary within which the prohibition was to operate. The plain sagacious men who framed the statutes entered into no such ingenious calculations; and a plain proof of this is the way in which they regulated the mid stream. This was all the extent of their mathematical calculations. In their

1812. prohibitions, they made no distinction of imaginary lines, where the sea ends and the river begins. They simply prohibited every species of standing machinery set in water where the sea ebbs and flows. These are the very words of the act 1553; a proof that by the term *waters*, were to be comprehended all such waters as the Frith of Tay, &c. Yairs on the waters of Solway, are yairs on the Frith of Solway; and nothing else was meant, than the large space in friths which forms the bason, or æstuary, land-locked by the coast. Wherever it is possible to draw a line from the one coast to the other, all within or above such line is to be understood as the river, or the water, where the sea ebbs and flows. This includes all the space where the fishing is exercised; and which, therefore, I think, cannot be legally exercised by yairs. Yairs are expressly prohibited; and I conceive stake-nets just to be yairs on a larger scale. As to the matter of fact, viz. What has been the actual consequence of these machines? I see it has been materially prejudicial to the upper heritors. The diminution in their fishings, upon an average of ten years, has been very extensive. On the other hand, some of the other fisheries have set at an enormous advance: one fishing which formerly set at L.5, has, in consequence of the stake-nets, set at L.2,100. Great gain and loss has arisen from the violation of the existing laws, which were meant to secure the rights of all heritors, and to repress all monopolies.

LORD MEADOWBANK.

When the case of Seaside was decided, I had the ho-

pour to sit upon the Bench, and I gave it as my opinion, 1812.
 that we ought to have had a proof of the effects of the
 nets at that time. The Court over-ruled me in that opi-
 nion, and in proceeding, I certainly did not see any dif-
 ficulty in construing the statutes to the effect of finding,
 that by the prohibition of yairs, the stake-nets were also
 prohibited in the situation in which they stood, in that
 case; and I gave my opinion in favour of the interlocutor;
 and that judgment was affirmed in the Court of the last
 resort. But when interdicts were applied for against
 other parties who had erected stake-nets about the mouth
 of the Frith of Tay, the Noble Lord who pronounced that
 judgment, entertained doubts of his former opinion, and
 that has suggested the trial of the case a second time be-
 twixt the present parties; and it well deserves to be tried
 and deliberately considered. I am glad to see that a
 proof has been taken. I wish much that it had been more
 extensive than it is. It should have extended to all the
 great rivers in Scotland; and I could have wished that it
 had been competent to your Lordships, and consistent
 with your forms, to have stopped the suit till such proof
 was obtained. I conceive, that we are still in ignorance
 of much of the real history of the migrations of salmon;
 and now that the matter of law has been much more
 sifted, the statutes much more thoroughly examined, and
 that a light has been thrown upon them, which far
 surpasses all my humble praise, it is very much to be
 regretted, that the facts have not been so thoroughly
 cleared up, as I apprehend might have been done. But,
 imperfect as the proof is, it is our bounden duty to com-
 ply with our modes of proceeding, and to give our opinions
 upon the case as it stands.

1812. Notwithstanding all the ability that has been displayed, I am of opinion, that the construction of the statutes, whether right or wrong, has been so fixed by decisions of the Court, that your Lordships cannot with safety shake it.

Much has been said of the immense patrimonial and national importance of the question. I beg leave to say, that I divest my mind as much as possible of the great value of the interests in competition. I compel my mind to consider it as if it were the case of an individual merely; for it is a question of law, which I am bound to construe as a Judge, tied by precedents, and not biassed by its consequences in any way. As to the various questions of expediency; as to the new light which has been thrown, by great ability, on what it is alleged ought to be the construction of the statutes, I am humbly of opinion, that it is the province of the Legislature only to appreciate these, and apply the remedy, if wrong has been done, not of your Lordships. You must tread in the footsteps of your predecessors; you must separate the new lights, which have been recently thrown upon the subject, from the case as it stood upon the old acts of Parliament, and the decisions of this Court. That is all that you have to do; you must consider these matters only, and decide upon them, whatever injury may be occasioned thereby to any person or body of men; and, if there shall be any wrong done to the public interest, by any judgment that you may pronounce, you may rest in tranquillity, in the assurance that the wrong will be rectified by the policy and wisdom of the Legislature.

I heard with peculiar pleasure, as I always do, the opinion of Lord Gillies. He went through the material parts of the case, I thought, with great accuracy; and it gave me the satisfaction of comparing my own opinion with an authority I respect so much. I have the pleasure of concurring with his Lordship entirely on the first point, as to the title to pursue. I think that there is no general title in the pursuers to maintain all manner of rights relative to the fishings; there must be an injury, an evil suffered; and, in order to make out that, there must be a loss endured, in consequence of something illegally done. Accordingly, formerly the penalties were recovered in the Justiciary, and still, in prosecutions for penalties, in the inferior courts, the procurator fiscal usually concurs. I will also just go this much farther, and say that, as the learned gentleman at the bar has made no observation on the new appendix, I must hold that it establishes, that there has been a great patrimonial loss; and, of course, that gives an interest to pursue; so that the question of title is truly involved in the merits.

The next question then is, Are these stake-nets legal engines or not, in the situation in which they stand? And this leads to two points, 1st, Do the statutes and the law of the country, as interpreted by our forefathers, comprehend such engines as these? and 2dly, Do they apply to them in the situations in which they are found? If they do, there is enough of evidence before us, that there is a loss sustained by the upper heritors to give them a title to pursue. And, in the outset, I certainly do conceive the explicit and only fair object of the sta-


1812. } tutes was to protect the multiplication of the fish, and augment and secure the productiveness of the fishery: and, I must own, I think there is no indication in the statutes of what Lord Woodhouselee has laid down. There is not a vestige of evidence, perceptible to me, that they were intended to prevent a monopoly on the part of the inferior heritors, or of any other body of men. It seems to me that the predominant radical idea of the Legislature was invariable, that they should preserve and encourage the breed of fish. That was the object of all their enactments. The Saturday's slap, and the mid stream, were not meant to serve primarily to protect the fry, but they were meant to enable the fish about to spawn, to get into those parts of the river that were proper for spawning. It was for the interest of the inferior heritors, more than of the superior ones, that the Saturday's slap and the mid stream were provided, in order that the breeders might get to their proper haunts. I think, that if there had been a project formed to prevent monopolies, the cruives above the places where the tide ebbs and flows would have been put down, as well as those below them. For what is a cruive? What is the object of it? It is meant to establish a monopoly of the fish, in so far as a monopoly can be established, in prejudice of all the upper heritors on the river. And the Legislature did not even put them down entirely: it only modified them. And what was the modification that was adopted? They seem to have thought, that they would do just enough, if they provided for replenishing the river, which they did by the Saturday's slap and the mid stream, although they suffered the cruives to remain a constant disadvantage to every fishing above them, and a palpable

encroachment on the fair use of the river. But so indif- 1812.
ferent were the feelings of our predecessors on these mat-
ters, that we all know that the mid streams were put an
end to by the negligence of the public prosecutors, and of
those having interest. In the same manner, (and this is
a thing which is not explained at all in the defenders' me-
morial,) why are the fry not better protected above the
places where the sea ebbs and flows? The cruives disturb
the fry no doubt; and I suspect there are a great number
of fry destroyed at most cruives. They disturb that easy
water, where it is observed that the fry take their way
down to the sea; and a great deal of mischief is done at
them by the thoughtless indifference and greed of the pea-
santry; and most certainly a great deal of harm is done
in mill-dams, in the manner prohibited by the act. But,
in so far as appears from this proof, the fry are much
more destroyed by the pursuers themselves, at their
cruives above the prohibited places on the water, and by
their pock-nets, and by other means, on different parts of
the upper parts of rivers, than by the stake-nets.

All this, your Lordships will observe, I throw out,
from a wish to explain distinctly the grounds that I rest
on in this case; for I by no means rest on this, that the
Legislature would have been even justified in depriving the
inferior heritors, on the æstuaries at the mouth of great
rivers, of their right of fishing in any manner they pleas-
ed, upon any principle or purpose of destroying their mo-
nopoly. They could not be justified if they had done so.
It would have been an abominable act to have destroyed
the right of the fortunate proprietors, who had their va-
luable interests within reach of the sea, in order merely to

1812. have favoured the naturally less productive fisheries of the upper heritors. It would have been just the same thing as to have prohibited a proprietor on the sea-shore from cultivating the better sorts of grain, &c. upon his lands, in order that the proprietors situated on the mountains might not be outdone by him. It is so absurd, that there can be no ground for it. It is an imputation upon the Legislature to suppose so. The only legitimate purpose they could have was to preserve the fry, and favour the increase of the fishery generally; and, on that footing, they were entitled to stop every engine that they thought might tend to displenish the rivers of fish,—every kind of engine that was incompatible with keeping the rivers in a full supply of fish. There was no intention that the inferior heritors should be deprived of any part of their right, in order to give the superior heritors more valuable fishings. That purpose would have been quite illegitimate; and the existence of every cruive proves a leaning in an opposite direction, to favour the inferior heritor at the expence of the superior. But if it was necessary, in order to give a supply to the river, to prevent the use of any instruments or machines that would catch the breeders, or prevent them from getting up the rivers, that was a legitimate object for the Legislature to proceed upon. Right or wrong, the Legislature express that to be their object; and, with that view, they have pronounced, during the course of many centuries, a great number of interdictions. They have interdicted a number of things, more or less, for the purpose of protecting and encouraging the breed of salmon; and your Lordships are now called on to construe the acts of Parliament in which this is done.

Now, there was one thing which Lord Gillies said, on 1812. the question of construction, which struck me. It is very odd, he said, that the Legislature should have used the term 'cruives' in the first instance, had æstuaries been in contemplation, or that they should have thought of interdicting them in æstuaries at all, where nature itself has interdicted them, and where it is impossible for men to have put them up. But it struck me, that if they had meant not to prohibit them in every place, excepting the sea itself, they used a very strange term. 'Where the sea fills and ebbs' is the phrase. This is a very broad and comprehensive term; a term too that is naturally ambiguous, if taken in the sense the defenders contend for, and which a person of common understanding would not naturally suspect was to be confined merely to those parts of rivers where the tide ebbs and flows continually, and not to comprehend those which the tide leaves altogether at low water, and fills at high water, nor æstuaries. It is very odd, that the statutes should not have distinguished between the places in contemplation more particularly, when it was speaking of situations far within the water. All these kinds of expressions look very loose and very general, more especially when it is considered, that they have used a term of vast variety of latitude. I imagine that the Scotch dialect 'water' is by no means confined to running waters. I apprehend it extends to narrow seas. I suspect the noted song of 'O'er the Water to Charley,' implies over the sea. It is a very ambiguous term. It is certainly a term of great latitude; and it was the duty of the Legislature, if they wished it, to have used words, showing that they meant to confine the prohibition. They have not done so; and what is more, it has

1812.  certainly not been so understood by the Legislature; for if your Lordships look at the statute of Queen Anne, you will see most distinctly, that the powers conferred on the Sheriff of Fife, to enforce the statutes, relate to the south side of the Frith of Tay, as well as of the river itself. It is perfectly plain that the Legislature, at that time, conceived that the Frith of Tay was within the prohibitions and penalties of the statutes.

I think also, that the grants of yairs, mentioned by my learned brother, operate another way from what he conceived: for I believe it was a very common thing, that in all matters of commerce, the King, in old times, was understood to have a dispensing power by the law of Scotland. In the middle ages, it was also understood very generally, that the commerce of the country was within the prerogative of the King. He at least was in the custom of granting privileges of various kinds, (leaving it to the Legislature, to be sure, to exercise its powers of cutting down the grants when necessary); but still I suspect it was a very common thing, in both parts of the island, for the King to make grants in the face of the general law; and there are many instances of it in the matters of trade and manufacture. There were great powers exercised in that way; and when your Lordships see how very few instances there were of grants of yairs, I suspect they were infringements upon, and not proof of the law. I think Mr Cranstoun's argument is irresistible, that if it had been matter of common right to erect yairs in friths, ages ago you would have had the whole course of the Tay and other æstuaries begirt with yairs; and I must therefore suspect, that the want of yairs upon it is the strong-

est national interpretation of the statutes. And though 1812. 'cruives' be indeed the leading word, it was so in connection with the yairs. Cruives were not confined to one situation, and were only objectionable *secundum subjectam materiam*. They are rather machines on the top of the cruive-dikes than the dikes themselves, and they are found every where along the sea-coast; they are sometimes long wicker baskets, and are used for catching herrings. These, I suspect, when attached to the inclosures called 'yairs,' or other such structures, might be the cruives meant as applicable to æstuaries. Different contrivances had been fallen upon, such as baskets, creels, coups, and other things, for similar purposes, and all fell under the prohibitions; for all might be deemed, not unreasonably, though perhaps erroneously, destructive of the fry.

I conceive the custom in both of these matters to be interpretative of the real meaning of the statutes, as understood by the nation. Whence the objection to stell-fishings? No man with a right of coble-fishing ever takes it into his head that he is entitled, in rivers or friths, to set up stells *ad libitum*. He cannot erect stages with a set of leaders annexed to them, to bring fish in his way. That is not a common right; and why not? It must be because such things must have been held to be just a species of yairs. It must have been something of that kind which led the King to interfere in the stell-fishings. Whence the prohibitions of stent-nets, but as an impediment to the ascent of the breeders, and as a fixed engine in the fishery, which it was the policy of the law to disallow. I cannot help thinking, therefore, that the restraints against all stationary nets and engines, together with the small

1812. number of yairs in the æstuaries of Scotland, form together
 { good evidence of the established construction of the statutes : I mean within what are properly æstuaries, for I do not speak of that confinement of the sea itself, which sometimes gives it the appearance of an æstuary : I mean such an æstuary as Lord Chief Justice Hale describes, that you shall be able easily to see the other side ; that you shall see the *fauces terræ* ; that still, in short, bears somewhat of the appearance of a river. I imagine the Forth below the Queensferry is always held to be the sea. In the same way, at the mouth of the Spey, no opposite coast almost is visible. I do not consider that the viewing out the coast, by means of glasses, can make it an æstuary, in the sense that I am speaking of. I conceive, that there must be something that gives it the aspect of a river at low water. That is the case with the Tay ; it has the aspect of a river at low water.

On the whole, therefore, I think there was room in the vulgar language of the times,—in the indefinite language of the Legislature,—to have established legitimately that construction, which I must say appears to me to have been put upon them in very old times, by the very acts and deeds of the country, by the Legislature itself, and by the Privy Council, as the legitimate guardian of the police of the country ; for that was its function. It was the proper court of police,—the proper guardian of the country under the King. Now, it certainly took upon it to fine severely for transgressions of the statutes. You see in Fountainhall an instance of its having fined the heritors on the Don, for using modes of fishing in violation of the policy only of the statutes. And I have no doubt that, if

my learned friend at the bar were to exercise his powers of research in the books of the Privy Council, he would find a number of instances of the same thing. Perhaps it would not be beneficial to his clients, but it would be extremely satisfactory to the Court. 1812.

Now, when I have said so much, I wish nevertheless that it shall not be understood that I throw out any opinion, that that interpretation of the statutes which the defenders have taken up was not originally the sound one. There is a great deal to be said for it. But the practice of the country has shut us out from adopting it.

I wish also to state, that I put a great deal of weight on the *discovery*, not the *invention* of Mr Jardine, as a most important fact in the case. It is a fact which has existed as long as the Tay; it is not a new fact. The influence of that fact is great, independently of the philosophical nature of the discovery, and the great and uncommon abilities displayed in it. It proves, that there is in nature a line of division between æstuaries and rivers, separating characters and qualities, which may at any time have been remarked as material on the present subjects, and which may afford hereafter important considerations in the proper place. The coincidence of that very curious fact, with the disappearance of the smolts, is a thing that must attract the notice of every man of reflection; and it affords such conviction to a man of patient inquiry, that, without some counteracting evidence, I can very well conceive that the Legislature may pay great regard to it indeed. Under such restrictions as the Legislature, in their wisdom, may think proper, in order to

1812. prevent the overdoing of stake-net fisheries, they may perhaps think fit to authorise their erection up to the point discovered by Mr Jardine. For if it be true, that the fry make their way to the sea in some deep channel, beyond the reach of the nets, and that they are not bred and educated on the shores of the æstuary among the mud banks, then it will be matter of general concern to have the statutes altered; for it will follow, that there is a public loss incurred, by not permitting the use of an instrument which does not at all affect the fry; and if it be true, that twenty-three fish are enough to stock the Tay, or ten times that number, there can be little danger of a deficiency of spawn.

But I must say, after all, that I really cannot yet consider the facts of the case as quite settled; and I am not clear that the mass of sea-fish found in the stake-net yards among the floating mud, may not contain, under some disguise or other, which the fishermen do not observe, but which naturalists may, a great number of the young salmon. And I am led to think this may be the case, because I believe that the sea is by no means a fruitful place, and that it is only in the neighbourhood of land that there is food for the inhabitants of the ocean; and I strongly suspect that the æstuaries are the very places where the smolts of all kinds grow and thrive. I believe it is very certainly known, that there is no vegetable matter in the ocean in the depths which Lord Mulgrave sounded. The food, therefore, that the animals get in the sea, is all in the neighbourhood of land; and I suspect that the smolts live and grow about the mouth of the Tay. And though this is merely a suspicion, yet it is a suspicion that warrants me in wishing that your Lordships shall not proceed

on the general philosophical views that you may have, 1812
 however theoretically sound, in the construction of the
 acts of the Legislature. These are subjects only for the
 consideration of the Legislature. That is the view which
 I have. If the construction of old times is to be modified
 by the ideas of the present age, it is to be done in such a
 manner, that if the Legislature relieves from the restraints
 of only fishing by net and coble, it shall at the same time
 afford sufficient protection to breeders, and also to the fry,
 both at first coming down and in its progress to maturity.

This seems to me to be probably the only way in which
 the case can be well settled. But, having to decide to-day,
 I feel myself strongly bound by the judgments of this
 Court. It seems to me thereby established, that stent-nets
 are unlawful, though they don't stretch across the stream.
 You must not interrupt the passage, even the side of the
 stream, with them; and can it be said, that because you
 add an inclosure to the stent-nets, which increases their
 power, that thereby the stent-nets become legal? I con-
 ceive, with great deference, that the stent-net and the
 stell-net generally are quite illegal, without a grant, fol-
 lowed by prescription; and I doubt very much if the King
 can now give any such grant. They are unlawful. Such
 is the law of Scotland; and I must, with great deference,
 think, that there has been too much weight laid on the
 statute with regard to the fishings on the Forth, above
 the Pow of Alloa; for I do apprehend, that this statute
 was meant for no other purpose than to declare the law
 pointedly. That was very common with our ancestors.
 They got many statutes passed, under the idea, that a
 new statute, enacting what already was notoriously law,

1812. would still make the law be better observed, without any idea of the law being in disuse. I farther observe, that there were penalties imposed, and a jurisdiction created by that statute; and therefore I don't think, that the engines that are there prohibited were thereby admitted to be lawful in other rivers; and I think, that the decisions which were pronounced in the cases of Annandale, Colquhoun, and others, afford demonstration of how the law was understood by the Judges of those days.

I own, I dare not touch these judgments; for I have formed my habits as an interpreter of the law, and not as a lawgiver, or person entitled to set up new constructions. I cannot help it. Whatever degree of hardships there may be, by existing laws, against parties using their rights, even harmlessly, I cannot give the laws a construction which our forefathers denied them. And here the interposition of the Legislature by positive regulations, is, I strongly suspect, requisite, to make the use either harmless or expedient. On this account it is, that I am, with great deference, for carrying down the prohibitions of the statutes to the Old Ferry on the Tay. I would go down to Ferry-port-on-craigs. There seem to me to be the *fauces terræ*; and therefore, my Lords, I am humbly of opinion, that your Lordships can only discern as to the stake-nets above that; for when you go farther down, the frith widens into a sea, and there it seems to me to be impossible that, on any construction of the acts, the nets are prohibited; for I never heard, that the prohibitions applied to the coasts of the proper ocean. I see nothing to hinder parties to do what they please there. It is only where there is *river*, in the vulgar acceptance of the word,

that I see either purpose or principle in the prohibition ; 1812.
and therefore I see nothing against erecting stake-nets be-
low Ferry-port-on-craigs. .

LORD ROBERTSON.

The judgment to be given in this case, will not only affect those who are parties to it, but it will indirectly affect every other fishing of the kind in Scotland. I am sorry that the Court has taken it up at this advanced period of the Session. I wish that we could have had more time to it ; and that we could have considered these papers with continued and unbroken attention, rather than in the hurried manner in which we were obliged to do it, during the period of a Session. And, in these circumstances, I shall rather state to your Lordships the result of my opinion, than its detail.


There are two questions to be considered. The first is, as to the title to pursue ; and the other is, as to the legality or illegality of the stake-nets. As to the title to pursue, I coincide entirely in the opinion delivered by Lords Meadowbank and Gillies, in so far as they are for sustaining it. But though I arrive at the same conclusion, it is really by means of different *media concludendi*.

In considering this case, it is of very great importance to know, whether the various enactments had in view the preservation of the breed of fish, or the preservation of the interest of individuals who had rights of fishing. But before saying any thing on that head, I wish to consider another question, viz. Whether, independent of any sta-

1812. tute, there is any common law right in the parties having an interest in the salmon-fishings, to quarrel or to interfere with the operations of their neighbours, and to what extent the common law carries that right. I cannot go the length of saying that there is any *ordinary* right of common property among the heritors ; but, at the same time, I cannot say that all their interests are quite separate and distinct. I cannot well conceive that a royal grant, conferring on any heritor the power of fishing salmon, should be completely destroyed and annihilated by another grant to another heritor. I am rather inclined to consider the rights of heritors on the same river, all of whom have grants of salmon fishing, as something analogous to that right which heritors have in running waters. It is not a right of common property, but it is a right of that kind, that an heritor, even on his own property, cannot do any thing that is to affect or to do injury to another heritor.

In the case between Sir James Colquhoun and the Town of Dunbarton, it was observed, as to a running stream, that though there is no common property in it, the right of an heritor was unquestioned, to prevent any alteration of the natural state of the river within his own property, and that no neighbouring heritor could do any thing to affect it ; and your Lordships will recollect the well known case of Fairly against the Earl of Eglinton. Mr Fairly had a mill upon the water of Irvine, served by a canal taken off the river within his own property, and which returned to the river within his property. The Earl intended to make a mill on his property, which was the inferior tenement ; and the effect would have been, to make the water regorge at times upon Fairly's mill, who brought




an action to prevent it, and the Earl offered to alter Mr 1812.
Fairly's mill, so as to answer his purpose equally well, at his, 
the Earl's, own expence; but the Court found, that he could
not lawfully, without consent of Mr Fairly, build a dam-
dike across the river, so as to cause the water to restag-
nate upon the gangway of his mill, and that Mr Fairly
was not obliged to alter, or suffer any alteration to be
made, so as to avoid the prejudice occasioned by the re-
stagnation. And your Lordships will also remember the
case, where it was found illegal to take a small stream from
so large a river as the Clyde. Now if these decisions were
well decided, and founded in the nature of property, I ap-
prehend that we must consider them as applying even to
this case; and an heritor, though he may have fished by
the common mode of net and coble, yet, if he has not been
accustomed to any thing more, he cannot be entitled to put
up any kind of machinery that is to hurt his neighbour;
and, in this case, I think the proof before us makes
out, that an injury has been sustained. I don't think it
is necessary to rest on any allegation of actual injury; for,
when your Lordships consider the acts of Parliament, and
the numberless questions which have been tried and de-
cided as to violations of the acts, I conceive that though
the question of title never came to an express decision, yet
it is completely fixed, that any heritor, upon the same river,
has a legal title to challenge any illegal modes of fishing.

As to the question, whether the acts of Parliament were
passed for the preservation of the breed of salmon, or for
preventing a monopoly on the part of any of the heritors,
to the prejudice of the rest, I am inclined to think that
they had none of these objects in view exclusively. They

1812. } may be considered, in the *first* place, as imposing restrictions on known and legal modes of fishing. Cruives are legal in some places. The Saturday's slap and the mid stream show this, and are modifications of legal modes of fishing. But there are other modes of fishing which are not legal. If it had been the understanding of the Court, that the statutes related merely to matter of public police, and were not intended to guard the superior heritors against the inferior ones, your Lordships would naturally have expected the actions to have been brought at the instance of the public prosecutor. But they have always been brought by individuals, and they never were called on to prove actual loss, in order to shew their interest. It has long been held, that an infeftment *cum piscationibus salmonum* is enough. I beg leave to call your Lordships' attention to another case of Sir James Colquhoun's: it was an action which the town of Dunbarton brought against him, on account of his mode of fishing in the Leven; and one of your Lordships and I, who were counsel in it, endeavoured to shew, that the town of Dunbarton had no interest whatever,—that their right had been exercised long before any fish got up to Sir James's part of the river, and consequently that they had no legal title to challenge his mode of fishing. But your Lordships will recollect well, that, on the authority of the decisions of the Court, it was held, that it was quite enough that the town of Dunbarton had been infeft *cum piscationibus*, and that nothing more was required to entitle them to challenge any thing prohibited by law. I have therefore no doubt as to the title of the superior heritors to pursue this action.

As to the merits of the action, there are two questions.

The one, if the mode of fishing practised by the defenders 1812.
is prohibited at all by the statutes? The other, if it is 
prohibited in such situations as they are placed in?

I am not at all inclined to go into the details of the case, after your Lordships have studied these very able papers; nor am I well able to do so; but the result is, that the impression on my mind is, that this mode of fishing is struck at by the act of Parliament; one of that kind which is comprehended under the general name of yairs; and, 2d/y, That the words *flumen*, *aqua*, waters, are genuine words, and apply in the broad sense for which the pursuers contend. They gave so many instances of it, that there can be no doubt about it; and, in addition to all that, your Lordships have the words of Lord Gray's charter, which in my mind clearly point out the extent of the river Tay to which the acts apply. The words are, 'incipien. 'abi sta parte hujusmodi, nuncupat. *Drumly Sands*, us- 'que ad summitatem et caput dict. aquæ;' and to that extent I am clear that the stake-nets are prohibited.

LORD GLENLEE.

I would have wished to have entered at length into a case of this kind, if it had not been that I find a great majority of your Lordships coinciding with me in opinion. The opinion that I approve of most, is that which was last delivered. It is a mistake to suppose, that there was no idea of a common law right on the part of the proprietors of salmon fishings, to prohibit each other from exercising their rights in any manner they please. At the same time, it is very difficult to say, what the common law rights are,

1812. now that we have got the statutes by which we must be regulated. I conceive that they are pretty much, though not strictly, analogous to the difference between the fair use of the water in a river, and the locking it up and detaining it, or diverting it altogether; and, in the same way, there is naturally impressed on the mind of man, at least I think there should have been so, a distinction between the fair use of the salmon in the river, and the catching them by means of long traps and inclosures. In short, if you were to suppose that the banks of the Tay had been peopled by a set of wild savages, it is very likely that this right of salmon fishing is one of the things that they would have quarrelled about for many ages, and would have differed and fought about, till they had settled some kind of compromise with regard to it; and it is a very natural idea, that such settlement as that would have come to work itself into the common law, independent of any statutes. I conceive, therefore, that the statutes were meant both to preserve the breeders and the fry; and also to prevent any of the heritors from using undue means to kill more of the salmon than they were entitled to do. I don't see any difficulty as to the title in this case, more than there is as to the right of any heritor whatever to challenge cruives and yairs in any situation; and surely we never before heard, that a party pursuing such actions was to be told;—why these are mere police statutes; you have nothing to do with them; they were meant only for the purpose of procuring plenty of salmon to the public, no matter where, and you, a single individual, have no right to interfere in it. No such defence was ever made, and I don't see any difference between this and former cases. I agree also with Lord Robertson, that whatever difficulty

there might have been as to the common law right, yet 1812.
 where there are statutes expressly prohibiting what they }
 complain of, any heritor is entitled to pursue. Take, for
 instance, the case of lint, the steeping of which is prohi-
 bited, in many places, by statute. I conceive, that any
 heritor has an interest to prevent it from being steeped;
 and it would be very absurd to make him bring proof that
 his fish had actually been poisoned by it. It would be
 enough for him to say, that the Legislature had prohibit-
 ed it, and that he did not chuse it to be done.

As to the proof itself, which has been led in this case;
 I will fairly own, that I would be obliged to have recourse
 to an accountant, to enable me to make up any accurate
 opinion upon it. In general, I must say, that I think
 there are symptoms of deterioration of the upper fishings
 by means of the stake-nets; but I cannot affirm it. The
 truth is, I have a preconceived opinion, that in course of
 time, the operations of the stake-nets will be injurious to
 the breed of fish, but I did not expect that we would, as
 yet, have been able to see, with any kind of precision,
 what harm had been done by the nets in any particular
 time. I conceived it would take a much longer tract of
 time to do that than has yet elapsed.

As to the increase of the number of salmon caught, and
 its being for the public benefit, so far from that being
 more favourable to the defenders' plea, in my mind it is
 just one of the circumstances which lead me to be against
 them. I remember very well in the case of Seaside, one
 of the things that struck me most, was said by the Lord
 President, that you cannot allow Mr Hunter to erect those

1812. stake-nets, without allowing all the other heritors to do the same thing, and the river would soon come to be barricaded altogether; that struck me very strongly. If a stake-net was a thing that could be put up only in one or two places, we might suppose that there was no great harm in it; but when we see that they must form a barricade for an immense way up the river, there can be no question of it.

To be sure, if the defenders can satisfy the Legislature, that the acts of Parliament are all founded in error, they may prevail in getting an alteration of the law, but I do not think it will be on such evidence as is now before us. If they can be satisfied that no harm is done to the upper fishings by the stake-nets, they may alter the law; but unless it is proved to them more completely than it has been to us, I do not think they will do it; and I do not think that we have any thing to do with it.

LORD CRAIGIE.

In this case I have found great reluctance in giving an opinion. I was counsel in all the cases, and I was also one of those who were consulted as to the propriety of instituting an action, and I was afraid that my opinion as a Judge might have been biassed by these circumstances; and with great pleasure I see, that whatever my opinion might have been, it could have had no effect on the judgment. I have now only to say, after all I have seen and heard in the case, that I have always been of the opinion delivered by the majority of your Lordships.

As to the title of the pursuers, I conceive, that wherever 1812.
the law prohibits any mode of fishing in a river, it is to
be held *præsumptione juris et de jure*, that the mode of fish-
ing, if practised, would be injurious to the whole owners
of fishings in the river; so as to authorise an action in their
name. The machines forbidden by the statutes are not
merely cruives, yairs, &c. but all such instruments in ge-
neral; and therefore I think stake-nets are comprehended.
As to the situation in which stake-nets are prohibited,
it appears to me, that there never was any distinction in
view between rivers and friths, and that the prohibitions
extend to all salmon-fishings in rivers, or within flood-mark
of the sea, or where the tide ebbs and flows. I conceive,
that the Crown has the right of salmon-fishing everywhere
within these limits, and is authorised to challenge viola-
tions of the statutes in all places; and the limitation of the
right of action in favour of individuals is this, that they
cannot challenge any fishing where they cannot shew a
particular interest; and therefore, in this case, if the
stake-nets had been beyond the mouth of the Tay, the ob-
jection to the title to pursue would have been good; but
as the fishings here are exercised in virtue of grants from
the Crown, and within the river, my opinion is, that the
prohibitions must apply to all the parties.

If I had entertained any doubts on the case, still I
would have considered myself as governed by the decision
in the case of Seaside. I know very well that it is said,
that the decision has been doubted of in the House of
Lords, and that a very eminent and learned Lord has ex-
pressed an opinion, that circumstances might be found to
place the question in another light. But in all very nice,

1812. cases, Judges will entertain opposite opinions; and as to making any distinction between the case of Seaside and those now before us, it is not in my power.


LORD JUSTICE-CLERK (BOYLE.)

The case which your Lordships are this day called on to decide, is certainly one of the greatest importance, not only to the parties concerned in it, but to the whole country also, as this decision must go to regulate every other question of a similar nature; and it must be a great satisfaction to all your Lordships, that this case has been treated with infinite ability, learning, and research, by the counsel, and that, in coming to our decision upon it, you have had all the aid that was possible from the bar.

There appear to me to be two questions in which we must give our decision,—the title of the pursuers,—and the legality or illegality of what has been done by the defenders. The pursuers of this action, in virtue of grants of salmon-fishing from the Crown, of which they are in possession, have brought their action, complaining of what they saw as a deviation from the law; and they insist on the mode of fishing practised by the defenders being done away. They are met by the defenders with two defences,—that they have no title to pursue the action—and that the mode of fishing which they practise is not illegal.

On the first of these questions,—on an attentive consideration of all that I have seen in the case, I am of opinion that there is a good title to insist in the action. I will not travel over the grounds of their right as at com-

mon law. I have bottomed my opinion, as to the right 1812. to insist in this action, on a careful review of the whole of this body of statutory law. It has been pleaded, that the object of the law was merely to make certain regulations of police, and that the assistance of the public prosecutor is necessary in all such cases. But when your Lordships look at the statutes, I think you must be of opinion, that there is a general declaration of what is lawful and what is not lawful. I apprehend, that a due observance of those regulations is made imperative on every party having a right of salmon fishing. No man who is invested with a right of fishing, is entitled to exercise that right in any way he chooses. There is a certain mode pointed out to him, in which he must exercise it; and he is entitled, on the other hand, to insist, that the other grantees from the Crown shall also do their duty. It is no doubt quite true, that this is of much consequence in preserving this most important right; but the Legislature has gone farther than that, and besides a number of acts which declare the law in general, there are other acts which raise the violation of these prohibitions into the rank of crimes. I am quite clear for one, that if the object of the action were to make the defenders suffer punishment, there the common law principle would apply, that the pursuers must have the concurrence of the public prosecutor. But I apprehend that to be totally distinct from another principle which applies in this case, that any proprietor is entitled to insist, that every man must conform himself to the rules of the law in exercising his right of fishing; and that in no such instance is the public prosecutor bound to appear, in order to give a title to pursue. And another reason for my holding this opinion, is the uniform concurrence of all

1812.  the decisions of the Court, in none of which, but a trifling case of the Earl of Fife's and another, was there any such concurrence, nor was it demanded. Certain I am, that if you follow former authorities, you will see that the regulations of the acts are enforced, and you will find an improper mode of fishing to be illegal at the suit of private proprietors; and I hold the want of such concurrence on former occasions, to be nothing but the meaning of the Legislature. Now, if such actions have been in the use of being sustained, I do not see that it is of much consequence to ascertain the principle which the Legislature had in view, in order to enable us to ascertain the rights of the parties to pursue. I conceive that it is quite enough, that a code of laws for the regulation of the fishings has been established, which will be universal in its operation, and that all parties having rights of fishing on the same river, are entitled to insist on the law being enforced.

Then comes the question, if it is indispensibly necessary that lesion shall be proved, in order to give a title to pursue. I am not prepared at present to say, that it is unnecessary that any injury shall be proved. I conceive it is enough for any proprietor to say, at the very first establishment of an illegal machine, that he chooses to have it put down, and that he is not bound to say what will be the effect of it. He is entitled to found on the acts of Parliament, and to contend, that the illegal method of fishing shall be instantly given up. The case of Colquhoun is most material on this point; for your Lordships will remember, that there was no proof whatever of damage in that case. There was nothing but an allegation, that the new mode of fishing injured the pursuers,

It was denied on the other side; and, in the next place, 1812. it was said, that if any diminution of the pursuers' fishings had taken place, it must have arisen from a very different cause—the poisoning of the fish by means of manufactures. Without any proof, the Court not only sustained the right of the town of Dunbarton to pursue, but they did so to the effect of cutting down the illegal mode complained of; and it was a most important matter that we got the title sustained; for, with regard to the other heritors, Sir James succeeded in shewing, that they had no grants of salmon fishings; and it was after a special remit from the House of Lords, to inquire into the title of the town of Dunbarton, and on a review of the whole principles of the law that the title was sustained. Now, if the fact be so, that in this case no proof of actual loss is required to sustain the pursuers' title, it does not appear to me to be of much consequence to inquire as to the actual result of the voluminous proof before us. I wish, in a case where the law has been so thoroughly discussed, that the fact had been so likewise. I do not think you have such precise and definite grounds to proceed on, in point of fact, as you might have had; but, at the same time, I am prepared to say, that I think there are certain important propositions made out. I think the superior fishings have been injured by the new erections. There is diminution enough to shew that. I think, on the other hand, that you have indisputable evidence of a great increase in the value of the inferior fishings. Another thing is, that there has been an apparent diminution of the number of fish caught in the tributary streams of the Tay; but I conceive that, so far as the proof goes, the fry is not destroyed to any extent. That, I think, is the fair result:

1812. of the proof, subject always to the qualification noticed by your Lordships, that they may have got entangled in the mud round the stake-nets, and in that way they may more readily become the prey of sea-fowls and other animals. But, in the mean time, I think there is clear enough evidence in the case. I do not conceive that it is necessary to have actual proof of loss. I think there is sufficient presumptive proof of loss in the statutes to give a title to pursue. I have no doubt of that; but I think there is enough in the evidence to show to us that loss has been sustained.

The second question is one of a different nature; and it depends upon the fact, whether this mode of fishing is struck at by the acts of Parliament. But, first, I shall just say here, without entering minutely into it, that there is no foundation for the plea which has been maintained by the defenders, though not very strongly, that the statutes are in desuetude. I am very clear that they are not. I think it is quite clear, that though the act 1427 was temporary, yet it was afterwards recited, and continued by the act 1478. The act 1469 is also recited in that of 1685; and though reference is made to it by a wrong date, I have no conception that an error of such a nature as that can weigh with your Lordships. In the Don fishing case, the Court found, that though there were some mistakes in the references, that the acts 1488 and 1563 were in observance; and when we see express reference to the provisions of act 1563 in the act 1685, we must hold it to be as much in observance as any of the others. I cannot conceive, that the act of Queen Anne 1705 meant to admit, or does admit of any such interpretation; and I

am therefore clear, that there is no foundation for main- 1812.
taining that the acts are in desuetude And if I had had
any doubt upon that, it would have been completely re-
moved by the uniformity of the decisions of the Court
from the time of Balfour downwards to 1807. These
cases shew, that every species of instrument that was
thought injurious, was put down as prohibited by the sta-
tutes ; cruives, yairs, stells, stent-nets, all were put down ;
in short, every kind of device has been found to be ille-
gal.

We have been told, however, that admitting the acts
to be in force, as they are of a prohibitory nature, we
should stretch and regulate them, and interpret them as
favourably as we can for the defenders. Now, admitting
all this, surely we are not to be prevented from giving
them a fair interpretation. We must give the statutes the
same fair examination that we would do to any other acts.
The subject has been thought worthy of being made into
a distinct code of laws by itself, and we are not to stretch
the statutes, so as to explain them away.

It is also said, that the great object of all the statutes
was merely the preservation of the breeders, and of the
smolts of the salmon. Now, I have looked into all the
statutes with all the anxiety in my power, and I have
not been able to bring my mind to that narrow construc-
tion of them. I certainly have no intention of fatiguing
your Lordships with going through these statutes ; but I
apprehend it to be quite clear, that while you have, on
the one hand, special enactments for the preservation of
the fry, you have also, on the other, in the very same

1812. statutes, general regulations, which go to regulate the fishings in general; and I conceive that this pervades a great number of the acts. The prohibitions against nets, coups, prynnes, yairs, &c. are not said to be merely relative to the fry; the expressions of the statutes are quite general. In the same way, I apprehend that the true construction of the clause regulating the cruives does not apply merely to the fry. In speaking of the Saturday's slap, it is made to apply to the whole of the river-fishings, through their whole course, and even when the fish were in good condition. On the other hand, where they are called salt waters, &c. the cruives are altogether done away. I cannot conceive, that even these expressions, which take cruives as the example, in the smallest degree narrow the statutes. But there are statutes which are quite general; such as the acts 1489 and 1563, which relate to modes of fishing which they call improper, and which must therefore be held to be illegal. Neither can I enter into a distinction which seems to be contended for, that if the proper *alveus* of the river is left free, they may do what they please on the banks of it, which are covered by the tide at high water. I can see nothing of that kind in any of the statutes; on the contrary, I see that one of the acts is expressly levelled against it. In the face of that act, is it possible to contend that the proper *alveus* alone is protected?

I cannot enter into the view which has been maintained with so much ability, as to the actual boundary of the river. I admire, as much as any man can do, the admirable accuracy of Mr Jardine. His report is well deserving of consideration in the proper place, and it takes

no new fact for its basis: it takes a fact in nature for its basis, and it operates on that. But sure I am, that it is not such a thing as that the judgment of your Lordships can depend upon it. You must look for a definition of the river to the Legislature itself, to royal grants at the time, and to the interpretation of courts of law. Look at the defenders' own titles, and, with the exception of Mr Dalgleish and Mr Maule, you will see that all describe their fishings as being in the *river Tay*. Then your Lordships have the act 1581, giving a jurisdiction to certain persons for destroying the cruives on public rivers; and in that act you have the Sheriffs of Fife and Forfar, and the Provost of Dundee, named among those who were to superintend its execution. I should be glad to know, if the Legislature had thought that the Tay ended at Errol Bank, how they could have given a jurisdiction to these officers, who had no right whatever to interfere above that point; and yet your Lordships see these individuals specially invested with the guardianship of the Tay. I am bound to believe, therefore, that the Legislature itself has told us what the sea and what the river is.

If, again, we are to take a legal definition of the river Tay any way different from what the Legislature and the titles of the parties afford, I apprehend it must be found in the boundary which nature itself has given it by the establishment of a bar at the mouth of it. Almost every river in Scotland has a bar at its mouth; and I conceive, that if you were to fix the extent of any river, you would do so by saying, that it reached to the bar; and therefore I apprehend, that when your Lordships come to apply what I conceive to be your judgment in this case, you

1812. must hold that to be the boundary of the Tay which is its bar. All the stake-nets that are within the bar, I apprehend, must be taken down, if they are illegal engines.

As to the question itself, whether the stake-nets are or are not struck at by the acts of Parliament, I must say, that I am very clear that they are struck at by them, and that they are of that species of machinery which your Lordships are bound to put down. It would be very tedious to go through the different arguments as to the distinction between stent-nets, yairs, and cruives. In the *first* place, I conceive it will be quite enough to look to the decisions of the Court in the case of standing nets. I apprehend that they alone would be sufficient to carry your Lordships through this case. The machinery here is of immense extent. There are leaders that run 500 yards in length in the river. But, *2dly*, When you come to examine the actual nature of the yards, I apprehend there cannot be a doubt that they are to be comprehended under the descriptions in the acts. I think the narrow explanation of the meaning of cruives by the defenders is by no means a good one; for, in the Solway, the use of cruives is allowed; and if they are right in speaking of their cruive-dikes, what is the meaning of that act? It talks of cruive-dikes stretching across the Solway, which is five or six miles over. But I conceive there are different kinds of cruives. I apprehend that it comprehends every species of device for catching the fish, and all of them are allowed in the Solway. But if yairs, which were composed of wicker-work, were prohibited, can there be any doubt, that when a machine of a much worse kind is invented, it also must be put down? Can there be any

doubt that this is the most perfect of all kinds of yairs? 1812.
 I apprehend that we are bound to put this construction on
 statutes, couched, as these are, in the most compre-
 hensive terms, mentioning every thing, such as coups,
 prynnes, narrow messes, nets, yairs, cruives, &c. This
 Court has formerly found them to be enough to prohibit
 every species of engine which the ingenuity of man could
 contrive. A case of the kind occurred in 1704; and, in
 short, wherever the Court has seen that the object of the
 law was likely to be defeated, they have thought them-
 selves entitled to put them down. In the case of the
 Town of Dunbarton, in their appeal case, a reason was
 assigned for this, of which the principle applies to all fixed
 machinery for catching salmon.

Now, the only point which remains, is, whether or not
 the machines, which are held to be illegal in certain situa-
 tions, are or are not so situated as to come within the
 words of the acts? I shall not trouble your Lordships
 with giving my opinion on this point at full length. I think
 that they are most distinctly comprehended under the
 meaning of the words of the statutes. The case of Sea-
 side did not bring the same precise set of facts under the
 view of the Court as we have here; but I think it is an
 authority which, in conjunction with the others, is well
 deserving of our consideration. It was very ably argued.
 It was affirmed in the House of Lords; and though doubts
 are said to be entertained in that quarter as to the pro-
 priety of the decision in that case, I don't conceive that
 they are brought before us in such a way that we can at-
 tend to them. I have a great respect for that Noble Lord;
 but I am not satisfied that he does entertain doubts of

1812. the decision ; for all the length he goes is to say, that perhaps the case might be viewed in a different light. For the reasons I have stated, I am for repelling the defences.

The following is a copy of the judgment of the Court.

Edinburgh, 7th March 1812.

The Lords having resumed consideration of the state of this process, and advised the same, with the mutual memorials for the parties, writs produced, proofs adduced, and former proceedings, they sustain the title of the pursuers to insist in this action, for having such yairs, stake-nets, and other machinery of the same nature, removed, as have been placed within the high water mark, for the purpose of catching salmon, or other fishes, opposite to lands bounded by the river, frith, or water of Tay, on both sides, or parts where such yairs, stake-nets, or other machinery are placed, and as far down as Drumly Sands ; without prejudice to the rights of such of the defenders as have fishings in the sea : Repel the defences, and find and declare that the defenders have no right, by themselves, or others employed by them, to erect or use yairs, stake-nets, or other machinery of the same nature, for the purpose of catching salmon or other fishes, within the aforesaid bounds : Decern and ordain the defenders to desist and cease from using the yairs, stake-nets, and other machinery complained of, and to demolish and remove the same ; and prohibit and interdict them from erecting, or using in future, the machinery aforesaid, or other machinery of the same nature, for the purpose of catching salmon or other fishes within the said bounds, and decern accordingly : Find the

‘ defenders liable in damages and expences to the pur- 1912.
 ‘ suers ; and remit to the Lord Craigie, Ordinary, instead
 ‘ of Lord Polkemmet, to hear the parties on the *quantum* of
 ‘ the damages and expences ; and to do thereanent as he
 ‘ shall see cause : and supersede extract till the first box-
 ‘ day in the ensuing vacation ; and in case a petition or
 ‘ petitions shall be then given in, supersede further, till
 ‘ such petition or petitions shall be disposed of by the
 ‘ Court.’

Counsel for the pursuers, Clerk, Cranstoun, &c ; Agent,
 James Thomson, W. S.—Counsel for defenders, Thom-
 son, M’Conochie, &c. ; Agent, Harry Davidson, W. S.

(SECOND DIVISION.)**THE CASE**

OF

THE ROYAL BANK OF SCOTLAND,

AGAINST

SCOTT, SMITH, STEIN, & COMPANY, &c.**AND THEIR ASSIGNEES.**

1812. **I**N 1795, William Scott, Thomas Smith, John Stein, Robert Stein, James Stein, and Robert Smith, entered into a contract of copartnery for carrying on business as bankers, insurance-brokers and merchants, in Edinburgh and in London. The firm of the Company at Edinburgh, was *Scott, Smith, Stein and Company*; and in London, *Stein, Smith and Company*. John, Robert, and James Stein likewise carried on business in copartnership as distillers, at Canonmills, in the county of Edinburgh, under the firm of *John Stein*; and at Kilbagie, in Clackmananshire, under the firm of *Robert Stein and Company*, but this copartnership was totally independent of that in which Messrs Scott and Smiths were partners. In 1798, William Scott died, and from that period

downwards, the remaining partners carried on the business in Edinburgh and London, till the 22d of July 1812, when the establishment in London stopped payment; and as soon as intelligence of that event reached Edinburgh, the establishment there stopped of course. The Distillery Company, although a solvent concern, and possessed of funds much more than sufficient for payment of its own debts, was also obliged to stop payment, and the estate of that Company was conveyed to trustees for behoof of their creditors.

On the 11th of August, a joint commission of bankrupt was awarded against all the partners of Stein, Smith and Company, and regular conveyances were executed in favour of the assignees of the whole estates, joint and separate, of all the partners.

While matters were thus in a train for division of the bankrupt estate in England, the Royal Bank of Scotland, who held a number of bills drawn by the bankrupts upon Messrs Kensington, Styan, and Adams, of London, proceeded to raise ultimate diligence thereon, and, upon the 29th of August, applied to the Lord Ordinary on the bills, for a sequestration of the estates of *Scott, Smith, Stein and Company*, as a Company, and *John Stein* and *Robert Stein* as individuals. In this application, appearance was made for the assignees under the commission, and for the bankrupts, who opposed any sequestration being awarded. Lord Bannatyne, Ordinary, first ordered memorials to himself, and then informations to the Second Division of the Court.

1812. In the mean time, the bankrupts having surrendered, under the English commission, passed the regular examinations, and having satisfied the commissioners and their creditors, they obtained the necessary concurrence to their certificates, and applied to the Lord Chancellor for his allowance. This was opposed by the Royal Bank, but their application was dismissed by the Lord Chancellor, with costs.

Whilst these proceedings were going on in England, the Royal Bank persisted in their application for a sequestration in Scotland, which they contended they were entitled to have awarded on various grounds.

In particular they maintained ; 1st, That the act 33d of the King, cap. 74, was imperative upon the Court to award sequestration, unless the debt was instantly satisfied and paid ; and that no party but the bankrupt himself was entitled to appear and object. 2^d, They maintained, that the English commission did not carry the property in Scotland, and that at any rate the creditors resident in Scotland were entitled to have sequestration awarded against their debtors resident in Scotland, and to have their effects divided according to the bankrupt law in Scotland, because they trusted them, and dealt with them upon the faith that that law was to regulate all matters between them. At any rate, they contended, that sequestration must be awarded in the mean time, leaving it to after discussion, whether the assignees under the English commission, or the trustee under the sequestration awarded in Scotland, should take the property situated in Scot-

land. 3d, They maintained, that the English commis-
sion had been obtained by the creditors in England, in
collusion with Mr John Stein, who, they alleged, went to
England after the failure, for the express purpose of com-
mitting an act of bankruptcy, and thereby authorising a
joint commission to be awarded to withdraw his funds
from Scotland. This, they contended, was, in the eye
of the law, a fraud of such a nature, as should induce the
Court altogether to disregard the English commission,
even supposing it to be otherwise effectual for carrying
the whole property in Scotland.

1812.

In answer to these several pleas, it was maintained on
the part of the bankrupts and their assignees; 1st, That
so far from the statute 33d of the King being imperative
on the Court to award sequestration in every case, it was
the very reverse; for the words of the statute were, that
the Court should award sequestration, if the debtor did
not appear, or appearing did not pay the debt or debts;
*‘ or shew other rsasonable cause why further proceedings
‘ should not be had.’* That if it was competent for the
debtor to shew cause, it was equally competent for the
assignees on behalf of the creditors at large to do so, and
that it was quite common for individual creditors to shew
cause against sequestrations being awarded, or to have
them recalled after they are awarded; and the only ques-
tion therefore was, whether the fact of the previous
commission having issued in England, afforded sufficient
cause why further proceedings should not be had in Scot-
land.

2d, To shew that this did afford sufficient cause, it

1812. was stated, that for many years past it had been constantly found, by an uniform train of decisions of the Supreme Court, that a commission of bankrupt in England carried the whole property of the bankrupt wherever situated; and that since the decision in the case of *Struthers v. Reid* in 1803, this had been held to be a settled point. Were the Court to award sequestration, therefore, in the present instance, the proceedings under it must be entirely nugatory, because the English commission, and conveyances under it, having carried the whole property, there would be nothing either to realize or divide. To award sequestration in such circumstances, leaving it to after discussion between the trustee and the English assignees, which of them should take the funds in Scotland, would be to create an authority for no other purpose but that of wasting the common fund belonging to the creditors in fruitless lawsuits. As to the imaginary right of the Royal Bank to insist upon a sequestration in Scotland, because their debtors resided in Scotland, it was altogether absurd; for although it was very true that the bankrupts had establishments in Scotland, and that one of themselves was resident in Scotland at the time of the failure, yet it was equally true that their great establishment was in London, where three of them constantly resided, and where a fourth partner had been resident several months before the failure took place. That it was a mere pretence for the Bank to say that they trusted to the law of Scotland being the rule; because they were quite aware of the establishment in London, and of the residence of the majority of the partners there, which rendered the funds of the whole concern liable to be carried off at any time by a commission of bankrupt; and

the same plea would exist with tenfold force in favour of 1812. the English creditor, because more than nine-tenths of the whole creditors resided in London, where almost the whole business was carried on, and where the whole debts due by the joint concern were payable, with the exception of the merest trifle.

Sdly, As to the alleged collusion, and the legal fraud thence implied, it was stated to be totally groundless. When intelligence of the failure reached Mr John Stein at Edinburgh, he was bound upon every principle of honour and justice, to repair to the place where almost his whole creditors resided, where nearly the whole business was carried on, and where all his debts were payable, there to surrender himself to these creditors, and to do whatever they should deem requisite for the general behoof: That his staying in Scotland could only have tended to embarrass the whole proceedings, and to occasion a ruinous waste of the general fund in law proceedings: That it was the wish of the creditors at large, that he should go to London: That he was advised by the most eminent counsel at the Scotch bar, that it was his duty to go there; and, in pursuance of that duty, he did go there, whereby a great, ruinous, and useless waste of the common fund was prevented, and one uniform and simple system of management of the bankrupt estate was insured, instead of four separate commissions, and a sequestration.

There were various other minor points insisted on by the parties, but the above is a short abstract of the great leading pleas maintained on either side.

1812. Upon advising the case on these pleadings, the Judges of the Second Division of the Court, 28th November 1812, delivered their opinions as follows :

LORD ROBERTSON.

This is certainly a case of great importance to the law. But it appears to me that we have clear principles of international law to govern our decision,—principles which have been repeatedly recognised by the solemn judgments of this Court, and to which I am of opinion that we ought now to adhere, unless we are to throw into confusion the whole system of our bankrupt law. But before I enter upon the general question, I shall take notice of some preliminary points that are insisted in by the Royal Bank.

In the *first* place, it is said that there is here no legal evidence of a commission of bankrupt having been issued, or of an assignment having been granted by the bankrupts under that commission. But it appears to me that there is nothing at all in this objection. It is really an attempt to introduce into the practice of this Court a rule which prevails in England, but which is quite foreign to the spirit of our law. By the English practice, if a man sue upon a bond, he must prove the handwriting; or if the assignees prosecute, they must prove the act of bankruptcy, and the issuing of the commission. All that may be very well, according to their views, but we do not adopt it into our practice. If a paper is produced as the ground of an action in this Court, it is certainly competent for the defender to deny the authenticity of it. He

may say that the deed is forged or fabricated, and if such an allegation be brought forward, it is incumbent on the pursuer to establish the authenticity of the instrument; or, in other words, to prove that it was truly granted by the party whose subscription it bears. But it is only in case of a denial of the authenticity that we require such proof. Now, what is it that the Bank are denying here? They are denying that a commission of bankrupt was ever issued; and yet they tell your Lordships that they have instituted proceedings in England, in which they admit that it was issued, and crave that it shall be recalled. How is it possible to listen to such an averment?—an averment which is made and contradicted by the party at one and the same moment. 1812.

In the *second* place, it was argued very fully in the Bill Chamber, that there were here two separate Companies; that the house in London and the house in Edinburgh were distinct and independent houses. This averment is completely disproved by the contract of copartnery, from which it appears that there were the same partners in both houses; the same trade; the same capital; and that they were truly one and the same Company, to all intents and purposes whatever.

In the *third* place, it was said, that the commission was issued collusively: That Mr Stein who resided here, and was domiciled here, went to England for the very purpose of committing an act of bankruptcy, in order that the commission might issue. I see no evidence of any such fraudulent intention; but even if there were, is this the competent Court to try such a question? It is said that the

1812. commission ought not to have effect; but surely that point ought to have been stated in England, before the Court from which it issued. Accordingly I see the petition to the Chancellor expressly sets forth that very allegation; and as this petition has been dismissed by his Lordship, I do not see with what propriety the matter can be taken up by this Court. I am therefore disposed to disregard this objection also.

I shall now state what occurs to me on the merits of the case. The facts are extremely simple. A contract of copartnery is entered into between six gentlemen, one of whom is since dead. The Company therefore consisted of five, who agreed to carry on business in London and in Edinburgh, and to have establishments in both places. Three of them resided in London, and the rest in Edinburgh. On the 24th of July last, the Company became bankrupt. A commission of bankrupt was sued out in England, and this took place before any proceedings had been held in Scotland for obtaining sequestration. These are the undoubted facts, and the question arising upon them is just this, whether such a sequestration can now be awarded, notwithstanding of the prior commission of bankrupt. Here I pray your Lordships' attention to the terms of the petition for sequestration. "You are asked to award sequestration of the whole estate and effects, heritable and moveable, real and personal, any way pertaining or belonging to the said bankrupts, either as a Company or as individuals, wherever situated. This is the ordinary stile of the prayer of a petition for sequestration, founded on the express provisions of the act of Parliament, and yet if it were granted, and if your Lord-

ships were to award sequestration of the whole effects, heritable and moveable, wherever situated, would not a deliverance to that effect just run counter to the subsisting commission of bankrupt issued in England; which, it is admitted on all hands, will certainly carry the moveable effects situated there? The Bank are aware of the absurdity of this conclusion, and they say that they do not carry their argument so far as to insist for the annihilation of the commission. But it is for us to consider how far we have any power, under the terms of the act of Parliament, to issue a limited or qualified sequestration, or a sequestration in any other terms than those which are authorised by that statute; that is to say, a sequestration of the whole estate and effects, heritable and moveable, real and personal, any way pertaining to the said bankrupts, wherever situated. Your Lordships have no power in the matter but under this statute, and I really do not see upon what principle you can be warranted in departing from the terms of it, which (if you are to award a sequestration), are imperative upon you to sequester the whole estate and effects, heritable and moveable, wherever situated. It is a question of great importance, what is the effect in Scotland of an English commission of bankrupt. In my opinion, the effect to be given to it in every country where the true principles of international law are understood is, that it must carry the whole effects belonging to the bankrupt. It is a principle which has been long established, that moveables have no locality: they follow the person of the owner, and their condition is governed by the law of his domicile. It may be said, that this is a fiction, and it is so. But it is a fiction introduced upon the soundest principles of justice, and in

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1812. practice has been attended with the most beneficial consequences. It has been confirmed by repeated decisions, and it is a principle which your Lordships will not now shake. It follows clearly indeed, from attending to the case of transmission of moveables *inter vivos*; and the doctrine is well laid down in the case of Sill, by Lord Loughborough, who states it as an undeniable proposition of international law, acknowledged wherever law is a science, that moveables have no locality; and as a voluntary conveyance of moveables in England will carry those situated in other countries, so must a commission of bankrupt issued in England, attach the whole effects, wherever situated. This indeed was settled in Scotland, by the case of Struthers against Reid, of which case there is nothing said in the memorial for the Bank. It is passed over in total silence. But it is impossible for your Lordships to overlook the effect of this decision, in which the principles that I have mentioned were fully recognised by a most solemn and deliberate judgment. It is said, that the jurisprudence of the country where the transactions are entered into, is an essential part of the contract between debtor and creditor. This is certainly true; but what is the inference from it? It is as good in the mouth of an English creditor as of a Scotch creditor; and the result would be, that there must be two commissions going on *simul et semel*, with all the inextricable consequences that must follow from such a system. It is impossible for your Lordships to listen to this doctrine, without flying in the face of the principle of law, that moveables follow the person. The result of the whole case therefore is, that there are here two houses, one in London, where some of the partners reside, and another in Edinburgh, where the others re-

side. The consequence of this is, that there are two do- 1812.
micles, and the consequence of that is, that the only rule
or principle that we can apply to the subject, is the pri-
ority in point of time, of issuing the sequestration or the
commission.

LORD MEADOWBANK.

As I concur entirely with the very accurate opinion which has just been delivered, I don't mean to make many observations. But the question is of great magnitude, and therefore I think it my duty to say something. In studying these papers, I naturally began with the memorial for the Royal Bank. There is something said there about an oath *de calumnia*, though if it were to be insisted on, on the other side, to its full extent, I do not know that it would be unfair to ask the counsel for the Royal Bank to swear *ut lis sibi juste videtur*. It did astonish me to find in that memorial a complete omission of all notice of the case of Struthers v. Reid, which involved the hinge of the present question, the very point upon which the whole turns; finding, as it did most distinctly, that there was an emanation—a binding influence of the judicial transfer in England, that reached the whole bankrupt estate in Scotland. That is the import of the decision in the case of Struthers. Now if the estate is carried so as to be no longer attachable by Scotch creditors, upon what principle can your Lordships sequester what does not exist, since the whole personal estate, at least, is, according to a solemn judgment, already vested in the assignees? However, we have a great deal of argument to show, that this was a collusive commission. This is very good, in point of re,

1812. levancy, but there is not one word upon the competency of this Court to try such a question. The relevancy was very properly brought forward, and the collusion stated pointedly and distinctly, in the proper place where it ought to have been stated; and yet these gentlemen tell your Lordships that they had the honour of withdrawing the petition, in which these allegations were made. Is that not abandoning the whole ground on which they contend that the commission ought to be quashed. Your Lordships cannot reduce and set aside the Lord Chancellor's commission of bankrupt. You cannot, under any of the sanctions of your action of reduction, reduce, decern, and declare against a commission issuing from the great seal of Great Britain. The proper step for this purpose was the very step taken by the Bank. Why did they abandon it? They say that some of the lines of their petition to the Lord Chancellor were scored and defaced. I really cannot understand this. I see there was a solemn affidavit put in denying the collusion *in toto*, after which the petition was withdrawn. I suppose if it had struck the Chancellor as a point that was to be seriously insisted in, he would have ordered it to be tried at common law. But if they thought fit to withdraw their allegation, upon an affidavit denying the collusion, must not I hold that allegation to be false? *That*, I apprehend, was the ground of the Lord Chancellor's judgment.

A different ground indeed struck me, which may probably have influenced his Lordship, viz. that the collusion is irrelevant. Is it a measure of collusion here, that a bankrupt grants a bill for the very purpose of founding an application for getting sequestration against himself?

That is universally acknowledged to be a fair measure in 1812. Scotland. There is an act of bankruptcy for you ; but you cannot object to it, because it is done for the fair and honourable purpose of cutting down partial preferences, and doing equal justice to the whole creditors. I suspect the Lord Chancellor must have thought, in the present case, here is a perfectly fair act done. This gentleman comes here to the chief domicile of the Company, and the seat of all its debts, to surrender himself to the great body of his creditors, and to expedite the business of the bankruptcy. Is there any thing fraudulent here ? Any thing collusive ? Any thing but what must be admitted to be a fair and legitimate purpose towards the creditors ?

But again, as to the competency, there is not one word said about it by the Bank. It is truly incompetent for your Lordships to set aside this commission. But is it competent for you to listen to the Bank, when they say, we don't demand a total reduction, we only pray you to reduce, decern, and declare *quoad* Scotland. Let it remain in England : we have withdrawn our objection to it there ; but do you find it null and void in Scotland. Now will your Lordships engage in a *conflictus legum*, where the party admits, that the ground of reduction, which if good at all would be good in England, has been withdrawn by him in England. By that proceeding he admits, that his ground of challenge is untenable, and the commission valid ; and if it is thus valid, can you abridge it of its effects, by entertaining that ground of challenge, which had been abandoned in the only jurisdiction competent to cut down that proceeding which it was calculated to impeach ? And will you allow this to be done to

1812. the effect of creating two incompatible systems of management, and throwing the whole affairs into confusion?

It is said to be a peculiarity of the law of Scotland, that it considers the stock of a Company as a pledge which the Company creditors are first entitled to liquidate, and then to come upon the private estates for the residue; and that it is a great hardship for Scotch creditors, who contracted upon the faith of the law of Scotland, to be deprived of this benefit. From this it is inferred, that your Lordships ought to grant a sequestration. But suppose a sequestration were awarded, I should like to know any principle by which you can prevent a Scotch creditor from ranking under the English commission, or an English creditor from ranking under the Scotch sequestration. There is here indeed only one bankruptcy, but the funds are to be divided among two sets of creditors, who may divide themselves at their own option, and may come here or go there just as they please. Was such an anomaly ever heard of, as this creation of opposite and inconsistent systems? It is impossible to give effect to it. You would involve them immediately in gross and palpable injustice. I really cannot enter into the ideas of the petitioners for the sequestration. I remember of the judgment in Struthers' case being pronounced in 1803, when I had the honour to sit on the Bench, and I can tell your Lordships that it was a most important case, though I thought it went a step beyond the rules of international law, as proceeding on correct principles, universally applicable to independent nations. For it was formerly a principle, that a judicial transfer only operated *intra territorium*, and had no binding influence beyond it; affording, however, a claim, in

justice to the interposition of the law of every civilized nation, to render it effectual, so far as not excluded by preferable diligence previously obtained ; and so much had this been the known understanding of the law of Scotland, that I remember of struggling with difficulty, when at the bar, in a case where the English assignees had obtained a decree against a debtor in Scotland, of the bankrupt to enable them to prevail over a subsequent arrestment. The question was, whether the decree obtained in this country was sufficient to bind subjects here, unless diligence by arrestment had issued in execution of it, or on dependence of the process, in which it had been obtained ? I succeeded in the case. The Court held that there was a title to pursue, created by the commission in the assignees under it ; but that it required the interposition of the Scotch Magistrate to give it effect ; and that the decree was such an interposition so as to exclude all subsequent diligence ; that, in short, I had a good title, if I chose, to render it effectual.* I remember I thought, therefore, in the case of Struthers, that it was a difficult thing to deviate so far from principle, as to transfer property in Scotland, by a judicial act of a foreign Court, without an application to the *imperium* of this country according to its own forms and rules ; and without even an intimation to the debtor of this judicial assignment, or any thing done to attach the property according to our own law. But what I yielded to was, the consideration that it had been recognised as law, by judgments in Westminster Hall, in so many cases, that it might be considered as a principle of the law of na-

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* Scott, assign of Mitchel bankrupt *versus* Leslie, 28th Nov. 1787.


1812. tions equiparating this case to the legal transference by marriage. When a lady of fortune, having a great deal of money in Scotland, or stock in the banks or public companies there, marries a gentleman in London, the whole property is *ipso jure* her husband's. It is assigned to him. The legal assignment of marriage operates without regard to territory all the world over. Feeling this, and seeing the predominant, the irresistible necessity, in point of expediency, of adopting the rule that Lord Hardwicke adopted in one of the cases mentioned in the papers, I, for one, bent to the necessity of giving effect to the principle, where a departure from it would be attended with such inextricable confusion. I remember well that all my doubts upon this subject were removed by Sir Ilay Campbell's strong argument, that, without adopting this principle, which the increasing connection between the two countries rendered doubly necessary, it would be utterly impossible to extricate the business of bankruptcy under different systems of management. Many questions would arise that would puzzle your Lordships beyond all possibility of solution, because there are no elements to resolve them; they are truly incompatibilities. The laws of the two countries are radically different, and you cannot *splice* them together by any contrivance. I admit, at the same time, that there is a great difficulty attending all this, in so far as it places it in the power of a debtor to chuse the country where he shall become bankrupt. But what have we to do with this difficulty? Let the Legislature settle it: It is their province and not ours. And here I must notice the sort of answer that is made on the part of the Royal Bank to many of the arguments used on the other side, viz. that in those arguments we are called upon to

exercise the powers of Legislators and not of Judges. But 1812.
 it appears to me, that this may be more truly said of the
 arguments used by the Bank. They apply to us much
 more as Legislators than the other party. Nothing can be
 more in this way than to say, that though by law the first
 judicial transfer extends to both parts of the island, yet
 we are to be required to say No, it shall not extend to
 Scotland. If we ask what title have you to call upon us
 to do this, Oh, they answer, it is collusion. But our reply
 is, try that before the Chancellor : go to him and plead
 your collusion. The law of England and of Scotland is
 presumed to be equally good. If a bankrupt is to have
 his choice between the two, that may possibly be an
 evil, but let the Legislature correct it. In the mean time
 we cannot quash a legitimate proceeding already taken in
 England. If any measure were to be adopted upon this
 subject, it seems to me that the useless subtlety of the law
 of England should be corrected, which requires a special
 act of bankruptcy to be committed there by each indivi-
 dual partner of a Company, before issuing the commission
 against him though absent from the country. Why not
 award the commission after proper induciæ, as we do a se-
 questration ?

LORD BANNATYNE.

A great deal has been said on the part of the Royal
 Bank, with regard to the collusion that is said to have
 taken place before issuing the commission. But I think
 the circumstance of the Bank withdrawing the petition
 is a sufficient ground for holding this allegation to be un-
 founded in point of fact. An affidavit is presented to the

1812. Chancellor, on the other side, expressly denying the collusion, which is acquiesced in ; and therefore I am entitled to hold, that this proceeded from the Bank's own sense of their averment being erroneous. Another question is, Whether the Edinburgh and London Companies were the same? Apparently they were different. They had different trades, different firms, and the one carried on business in London and the other in Edinburgh. But the fact is, that they were not different ; and of this we have now satisfactory evidence, because we have the original contract of copartnery, by which it is proved that they were originally, and have been all along, one and the same Commercial Company. As they had a domicile in both countries, they were equally liable to the operation of the bankrupt laws in the one country and in the other ; and that being the case, how can the line be drawn, as they are subject to both bankrupt laws. Whoever is entitled to the benefit of these laws, has his option to take the benefit of the one or of the other. But if he take the benefit of the English commission, he cannot take the benefit of the sequestration ; and if he take the benefit of the sequestration, there can be no commission. It is a maxim of universal law, that moveables follow the person ; and therefore it is clear, that these must be carried either by the sequestration or the commission, according as the one or the other is first issued. Suppose a sequestration were issued against a man not domiciled in Scotland, this cannot receive effect in England ; and in the same manner, although a commission of bankrupt was ever so fairly obtained, yet if it be produced here, and we are satisfied that the party was not domiciled in England but in Scotland, I should hold, in that case, that

we are not bound to give effect to the commission. With 1812. 
 regard to the estates of these Companies, there is no
 room for either of these difficulties. But it does appear
 to me, that there is a difficulty, for here there is an ap-
 plication for sequestration, not only of the Company
 estates, but of the individual estates. These individuals
 were both domiciled in Scotland. They carried on two great
 distilleries, which make no part of the Company funds;
 and I confess I would have very considerable doubts how
 far we ought not to sequester their individual estates;
 but as the application at present stands, I am for refus-
 ing the petition.

LORD CRAIGIE.

In general I agree with all that has been stated by your
 Lordships. I think it right to refuse this petition for se-
 questration. At the same time I beg leave to reserve my
 opinion when another case happens, which, in substance,
 may be that which the present case was said to be in the
 Bill Chamber. I think if this case had come before me
 there, that I as an Ordinary would have awarded seques-
 tration. Although it was said that a commission of bank-
 rupt had been issued in England, that might have been
 done for the very purpose of evading a sequestration.
 Suppose the bankrupt had died immediately, so as he could
 have executed no conveyances, the estates would have
 remained without management of any kind, unless a se-
 questration had been issued. To be sure the effect of
 a sequestration would have been an after question; and
 when the assignees came and stated the fact of the Eng-
 lish commission having been issued, then I should have

1812. decided which of the two should prevail. I have no idea that *ipso jure* an English commission does exclude the operation of diligence in Scotland.


LORD JUSTICE CLERK.

This is a case of very great importance. I don't think it necessary to enter at large upon the consideration of the preliminary questions, because I agree entirely in the observations which have been made. The case stands now upon a totally different footing from what it did in the Bill Chamber. Had I been called upon to say, whether as a Judge bound to give effect to the act of Parliament by granting sequestration wherever the conditions of the statute *prima facie* appeared, I fairly confess I should have felt great difficulty in saying how far I could have been justified in refusing to award that diligence. But now, undoubtedly, the case is in a very different situation, because we have now the notoriety—the absolute confession of the Bank, that they have been proceeding upon the foundation that the commission has been issued.

The difficulty that I have in this case, is, that this is an application not only for sequestration of the Company, but of the individuals, who have been rendered bankrupt according to the law of Scotland. But I do not think it necessary to go upon this ground at present. We are now to decide the great question, whether a commission of bankrupt, issued with all due form and solemnity in England, ought or ought not to carry the estates of parties who have been rendered bankrupt in England, but who have effects in Scotland. I agree with all the opinions

given by your Lordships upon this general point, because I conceive that such opinions are only giving effect to previous solemn judgments. I therefore would not be disposed to do any thing that can shake the principles determined by these judgments; and I should have thought the Bank would have seen the expediency, for their own cause, of granting the general point in the argument. But the question is, whether there is any thing in this case, either as to the Company or individuals, that can create a doubt with regard to granting or refusing the petition. I shall add nothing to the statement of the inextricable difficulties that would follow, from allowing two systems of management to go on *pari passu*; but the circumstance that has always struck me, is, whether there was or was not any thing in the conduct of the parties—any thing that could create a doubt as to the application of the principle. Now, I fairly confess, after all I have heard, I remain of opinion, that it was not a duty incumbent on Mr John Stein to go, nor do I think that he ought to have gone, forth of Scotland, for the purposes that have been mentioned. I see a letter from him to his agent Mr Gibson, referring to a prior authority, which I understand he had left with him, to apply for a sequestration; and he again empowers him to do so, if that measure shall be judged necessary by his friends. That measure, however, was not followed: I regret that it was not followed, according to his original intention, which seems to have been fairly formed. His domicile was in Scotland; he was an ostensible partner of a Scotch house; his large personal property was in Scotland, and, being the *primum mobile* of the great house carried on within the Royal Exchange in Edinburgh, I do think he was influenced by improper consi-

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1812.  derations in the step which he took. I know that, had I been in his situation, I should not have absconded to England, or co-operated with the partners of the English house in creating embarrassments in the way of diligence already raised against me in Scotland.

But the question that results from this, is, whether your Lordships, in any documents before you, have sufficient evidence that there was an improper collusion between him and the assignees,—any thing, in short, which can entitle you to interfere in this case. Now, there, I own, that the great difficulty lies. I feel most certainly the force of the observations which have been made by such of your Lordships as have spoken upon this point. The proper place was to have gone before the Chancellor; and certainly the parties did put in averments, upon their part, to this effect. But we have undoubted evidence that the petition was dismissed; and therefore the trial of this point, you are entitled to say, has already proceeded, and been determined. But, on the other hand, if your Lordships had the view of this case, which I see a majority of you have not, the principal question would be, Am I entitled, under the circumstances of this application, to grant any thing different from what the act authorises? The difficulty stated by Lord Robertson is very strong, that your Lordships, acting ministerially, are bound to make your orders conformable to the statute. Now, the petition prays for sequestration of the whole estate and effects, wherever situated. They say, indeed, we will be content to take a sequestration *quoad* Scotland only. But I really do not see how it is possible for your Lordships to get over this difficulty. I must either grant or refuse the prayer of this

petition ; and, however strong a view I may take of Mr 1812. Stein's individual conduct, I feel that I cannot grant the prayer of this petition. The commission of bankrupt cannot be controlled by us.

There is another point, which, I confess, does appear to me in the same light with the other circumstances in Mr Stein's conduct that I have already alluded to. On the 6th of August, application was made to him for his concurrence, with a view to have sequestration awarded ; but this he refused. He then goes to England, and it is not till the 11th that the commission was issued. Now, at this time, there were four individual commissions issued against the four individual partners. Mr Robert Stein I lay out of view. He had been in England for six months, and he was not summoned at the market cross of Edinburgh, pier and shore of Leith ; which, in my opinion, is a fatal objection as to him. But no commission was issued against Mr John Stein until the time that I have mentioned. It is said that there is a defect in the law of England, in so far as the Chancellor has no power to include the Company and the individuals in one commission. I think it is so ; but such is the law, and the Chancellor has not power to do otherwise. Here there were four joint commissions. Mr Stein arrived in England, and the act of bankruptcy was of course inevitable. Now there is no doubt, certainly, that under this commission, the whole effects of the Company, and the four partners, fell under the operation of the bankrupt law of England ; but then, so far as John Stein was concerned, were not all the proceedings that took place just the consequence of his voluntary act in going to England, and I must say, in distinct terms,

1812. *evading the diligence in cursu* against him? Giving full effect therefore to the general principle, I apprehend, on the other hand, unless it can be shewn that you are barred by any thing that has taken place, you are bound to watch lest any proceedings shall be carried on, by persons domiciled in Scotland, which can interfere with the application of your own rules of law. For, with all the respect that I feel for the law of England, I am bound to direct my conduct by the law of Scotland; and surely it is a great anomaly, that a debtor, merely by stepping across the boundary of the two countries, should have it in his power most deeply to affect the interests of his creditors, especially as I believe that the affairs of every bankruptcy can be settled at much less expence in Scotland than in England. As to the real estates situated in Scotland, it is admitted, that without the private conveyances nothing could have affected them. Now, seeing that all these were the individual proceedings of Mr John Stein,—that the transactions were by a house carrying on business in this city, of which he was the principal partner, the sequestration, so far as concerns his estate, is a part of the case upon which I have great difficulty; but still, under the act of Parliament, I feel that I cannot give effect to the view which I have taken of the case, because we cannot interfere with the Chancellor's commission.

Mr. CLERK, on the part of Mr John Stein, referring to that part of the Lord Justice Clerk's speech which assumed, that Mr Stein, when applied to on the part of some of the Scotch creditors, had refused to give his concurrence to a petition for sequestration, observed, that this state-

ment was not correct in point of fact, as it was positively 1812.
denied on the part of Mr Stein, that he had ever refused
his concurrence to a sequestration prior to the issuing of
the commission. With regard to the censure cast upon
Mr Stein's conduct, in so far as he went to London, in
place of remaining in Scotland, Mr Clerk stated it as a
fact consisting with his knowledge, that Mr Stein was
quite passive in this matter; nor when he went to Lon-
don had he any view to the legal consequences of such a
step, or any knowledge how it would operate. In the
whole of his conduct upon this occasion, Mr Stein was
guided by the advice of his friends, and of Mr Clerk him-
self, his counsel; and although he was strongly urged by
his English partners not to go to London, but to remain
in Scotland, upon the ground that it would be more for
his interest to do so, yet the advice that was given to him
was, that, at such a crisis, it was his honour and charac-
ter, and the interest of his creditors at large, and not his
own personal interest, that was to be regarded; that, as
the Company was domiciled in England, the whole cre-
ditors English, and a commission issued in England, it
was his duty to surrender himself to his English creditors,
and to give every facility in his power for expediting the
business of the bankrupt estate.

LORD JUSTICE CLERK.

All that may be very true; but it does not in the least
degree alter the opinion that I have expressed.

1812.



LORD MEADOWBANK.

I confess I should have given Mr Stein the same advice as Mr Clerk. I think he was perfectly right to go to the domicile of the great machine, and to submit himself to the directions of the great body of the creditors.

Lord ROBERTSON expressed an opinion to the same effect.

Lord GLENLEE was present, but did not deliver any opinion. He seemed to assent to the views of the case taken by Lord Robertson and Lord Meadowbank.

The Court then pronounced judgment, refusing to award sequestration. Against this judgment a reclaiming petition was given in for the Bank, and was followed with answers for the assignees; upon advising which papers, on the 20th January 1813, the Court delivered their opinions as follows:—

LORD MEADOWBANK.

I never had any difficulty in this case. It appeared to me quite clear; and I am sure if any person had any doubt, it must be most thoroughly removed by the very accurate paper given in for the respondents. There is not a superfluous word in it; and it contains the whole law of the case. I think I would be detaining your Lordships to very little purpose by saying any thing *now*; because all that I could say would be a mere repetition of the

contents of that very able paper. I expressed my opinion 1813.
 at length formerly, which coincides with it in every point ;
 and I have really nothing more to say. As to the way in
 which the argument has been managed on the other side,
 it put me in mind of a very laboured paper, written by
 the late Mr George Wallace, which stated every one case in
 that class of questions of international law which relates to
 competitions of Scotch diligence with the title of assignees
 under an English commission ; and professed to reduce
 them to perfect uniformity of system, as if they had re-
 sulted from one enlightened head, settling a code of bank-
 rupt law, and were not, as we know them to have been, very
 frequently in direct opposition to each other. Really there
 is a great deal in this paper for the Bank, that contains
 the law of a period when the law was not matured, and
 was totally different from what it is at present. I con-
 ceive the case of Struthers to be most important ; not to
 be attacked by side winds, but, if questionable at all, to
 be tried in the most formal manner, and with a view to
 carry it to the last resort. We are told also, that this is a
 case of equity, and that he that seeks equity must give equi-
 ty, and that Mr John Stein has been inequitable, because
 he has gone across the Tweed to do the most effectual
 justice to the great body of his creditors ; this really ap-
 pears to be too extravagant. It is a case of law. There is
 equity in it to be sure ; but that is because we are bound
 in justice to do what is asked. It is not matter of discre-
 tion, or *comitas*, as here pretended. It is matter of legal
 right, that a party in possession of the sentence of a
 foreign court may come here to get that sentence execut-
 ed. It is not *comitas*, it is justice, that is demanded *ex*
debito justitiæ. I consider the case of Struthers as settling

1813. this point, that the whole funds of the bankrupt are carried by the commission ; and, conversely, that they would have been carried by a Scotch sequestration, if awarded prior to the commission, whether they were situate within the jurisdiction of the English law or of the Scotch. The bankrupts' estate, therefore, being under one system of division, you cannot with any kind of justice counteract it, or cripple its effects.


Thus, the Lord Chancellor's certificate is a part of the proceeding ; and on what pretext could we refuse to it the efficacy which in so many cases has been given it ? If your Lordships were to interpose your authority to the discharge of a Scotch bankrupt who carries on trade in England ; and if the Courts there were afterwards to sustain a suit against him, in my opinion they would do gross injustice. The commission is one machine not to be carved upon, but to be taken as it stands ; and I just adopt it as I find it. There may be incorrectness in its action, as there is in that of all human instruments ; but we cannot remedy it. Something is said as to the law of England, with respect to pledge, which, if it be correct, shews it to be a very bad law ; but I don't believe it. It is inconceivable, that if the Bank have a good pledge here, they will not have the benefit of it in England. The Chancellor would do justice to them. A pledge particularly imposed in this country must remain in England. The law cannot be as they state it. In my opinion, we can do nothing but follow what the authorities legally warrant.

LORD ROBERTSON.

In this advanced stage of the litigation, I think we may dismiss, in a very few words, a preliminary objection that was strongly pleaded by the petitioners in some of their former papers, and is even repeated in this petition, viz. That there is no evidence before your Lordships of the existence of a commission of bankrupt. That, I think, we may now fairly dismiss; and I think we may also dismiss the other objection, founded upon the assertion, that there were here two separate Companies, and not one and the same Company. The contract of copartnery is a good answer to that. There is a third preliminary objection, with regard to the alleged collusion, on the part of Mr John Stein, in going to England for the purpose of being made subject to the bankrupt laws of that country. Upon this subject, the argument of the petitioners does not make the smallest impression on my mind. I see no evidence of any collusive or fraudulent intention on the part of Mr Stein. On the contrary, I think he went to London from a very laudable and proper motive,—the desire of saving expence, and doing justice to his creditors; for, if he had not taken this step, the affairs of the bankruptcy must have been conducted under four separate commissions, besides a process of sequestration going on in this country. Mr Stein had a most strong and powerful interest to prevent the intolerable expence of such proceedings. His object was fair and reasonable. He went to prevent expence—to put his affairs under a proper train of management, and to do justice to his whole creditors. There are two main points to be

1813. considered; 1st, The plea that a sequestration is a diligence of such a nature that it is merely a ministerial act to award it, and that no opposition can be made, except upon certain grounds that must be instantly verified; and, 2dly, The great general point, whether a commission issued in England, prior to any proceedings in Scotland, is a bar to a sequestration; or whether, notwithstanding the commission, sequestration may still be awarded?

Upon the latter point I mean to say nothing, because I formerly stated the grounds of my opinion, and I have since seen no reason to alter it. I shall therefore confine myself to the first question; and it is certainly a point of very great importance, not merely in this, but in every question under the bankrupt act. The general proposition laid down is, that the proceeding of a sequestration is merely a ministerial act, in defence against which the bankrupt is confined to certain specific pleas. This is a doctrine to which I cannot assent. It is not in any degree warranted by the act of Parliament, but is expressly contradicted by it, and by repeated decisions of this Court. In all cases of ordinary diligence, even where there is no clause of registration, which, being a consent by the debtor, is itself a foundation for summary diligence, it is not necessary to cite the debtor; it is not necessary where a horning or caption is issued; it is not necessary in a bill for an arrestment or an inhibition. In not one of these cases is the debtor cited; whereas it is the beginning of a process of sequestration. This process comprises in itself all other diligence of horning, arrestment, inhibition, and adjudication. It is a process, *sui generis*, which has other objects in view from common diligence. It divests the

bankrupt of his whole estate and effects; and it is the 1813.
first step of it to vest the whole property in a trustee, for 
the purpose of a fair distribution. Even where the debtor
himself concurs, the awarding of sequestration is not an
act of ministerial diligence, because it is in the power of
creditors to oppose it. The law does not require them to
be cited, because they cannot be known. But it is in the
power of any creditor to appear and shew cause why se-
questration should not be awarded. In one of the cases
mentioned in the papers, the bankrupt's application was
opposed by creditors, upon the ground that he did not fall
under the description of the act: No doubt it was awarded
in the end, but it was upon a full discussion of the plea of
the creditors; and no such idea was ever entertained, as
that the creditors were not entitled to shew cause against
the sequestration *in limine*.

In the case of Keir and Dickie, the application was at
the instance of the debtor, and it was successfully opposed
by a creditor; so that even where the application is made
by the debtor himself, it is not a mere ministerial act to
award the sequestration. It is competent to any person,
having a legal interest, to oppose it; and we may all sup-
pose cases where the creditor has such an interest. A
creditor who has begun his diligence may oppose a seques-
tration improperly applied for; and many cases of the
same nature may be stated. It is farther said, that it is
only competent to the bankrupt himself to oppose a seques-
tration. Suppose that were the law, has not the bankrupt
himself appeared here? Is not he one of the parties who
are here opposing the sequestration, upon a ground which
your Lordships have found to be good, viz. that the

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1813. whole of his funds are in the hands of the English assignees, and that the sequestration is incompetent? But suppose the debtor had not appeared, yet, if the creditor can oppose the sequestration, it would be competent for the assignees, who have in them the whole rights of the creditors, to appear and shew cause against the sequestration. Your Lordships know that, by a special provision in the act, a creditor who has not concurred in the original application may apply to this Court, at any time within thirty days, to have it recalled. Is it possible to suppose that, if a creditor would be entitled to do so, he would not have an equal right to be heard against the sequestration in the beginning?

In short, I apprehend, that wherever a party has an interest he may oppose the awarding of sequestration. It is not a ministerial act. It is not like issuing a horning. It is not like issuing an arrestment upon a dependence. It is not like letters of inhibition,—all of which proceed without any citation of the party. It is a process, *vi generis*, deeply affecting the interests both of the creditors and the bankrupt; and if they, or either of them, chuse to oppose it, they have certainly a sufficient interest to do so *in limine*. On these grounds I am not at all moved by the petition, and am clear for adhering.

LORD BANNATYNE.

When I was satisfied that the Companies were one and the same, I felt no difficulty in refusing the sequestration as to their estates. As to the sequestration of the individual estates, I felt considerable difficulty. But the ar-

gument of the petition goes entirely to the sequestration of 1813. the Company's estate ; and, upon that subject, I considered the case of Struthers to be completely decisive, that one and the same estate cannot be the subject of a commission in England and a sequestration in Scotland. The preference of the one to the other just depends upon the first step taken, whether it is done under the one law or the other. As to the preliminary points that were formerly stated, they are unnecessary to be now noticed : they are all out of the way.

Another point is stated, requiring the attention of the Court, viz. Whether the sequestration is a proceeding that can only be opposed on certain grounds that can be instantly verified. I think the petitioners carry this argument a great deal too far. They consider the sequestration as a piece of summary diligence ; but it is perfectly clear, that not only the bankrupt, but the creditors, are entitled to oppose the sequestration ; and, in this case, we have the bankrupt appearing and opposing the sequestration, upon the ground, that his whole effects are made over to the English assignees ; and we have also the assignees, saying that there can be no sequestration, for the best of all possible reasons, because the estate is already vested in their persons. No harm can arise in any case, from refusing a sequestration in the mean time, because, when awarded, it draws back to the date of the original application, and operates as an inhibition. It affords a good ground for cutting down all alienations and preferences, even although it does not operate as a sequestration until we have considered the question, whether it shall be awarded or not.

1813. A very simple proceeding of this nature occurs every day. A farmer applies for a sequestration, on the ground that he is a grazier. Do your Lordships take his word for it? By no means. You ordain him to give in a concordance of his dealings; and it is only in case of his being able to make out that he is truly a grazier, that you award sequestration. In short, it is perfectly clear that the argument is ill founded. Sequestration is not a summary diligence, but a process of a very peculiar kind, and not to be awarded until all parties are deliberately heard.

LORD CRAIGIE.

It appears to me that the case stands nearly where it did. I formerly thought the sequestration ought to be immediately awarded, reserving the effect of it afterwards, not upon the ground that we are called upon to act ministerially, but because it does not appear that, in the case of an English commission, every part of the property in Scotland is equally cared for; and the commission, besides, does not carry the real estate.

With regard to the general question, we cannot now enter into any inquiry whether the decision in the case of Struthers was well founded or not. If the matter were open, I think a great deal might be said upon it. It appears to me, that the decision was given upon grounds of expediency, and I doubt the expediency of extending the English bankrupt law to this country. I think there are many objections to it. The facility of the bankrupt's obtaining a discharge is very objectionable; the time is too early. But, besides, I doubt whether it is in the power

of this Court to adopt the law of a foreign country, in 1813. place of our own law, upon principles of expediency. But, as the matter is not now open, I must hold the case as an authority.


LORD JUSTICE CLERK (BOYLE.)

Your Lordships must judge of the case as it stands in these papers. I will fairly state, that although I am not indisposed to concur in this judgment, it has occurred to me, for some time past, that the proceeding which we ought to adopt here, is to make this case the subject of a deliberate hearing in presence. That is the way in which it appeared to me proper to decide this great question. I see that, in every one of the leading cases that are quoted as authorities to us, the Court proceeded with the greatest deliberation, in having the question solemnly argued.

When the case was formerly before us, I felt it to be my duty to state, that I did entertain great doubts of the propriety of Mr John Stein's conduct in removing to England, for the purpose, as I then thought, of counteracting the proceedings of his creditors in Scotland. But I now think myself bound, in justice to Mr Stein, to say, that a very considerable proportion of those doubts have been removed, by the very able statement of the answers. I agree, that there appears to be a very laudable motive in relieving the creditors at large from the burden of the expence attending so many co-existing commissions, obtained without any concurrence on the part of Mr Stein. Seeing that there would have been four separate commissions going on in England, besides a sequestration in Scotland,

1813. I do think there was a laudable motive in going to England; and therefore I feel myself bound in justice to say, that I have not the same view of the case, on that point, that I had. But I beg leave to reserve to myself to apply my opinion to a different state of the fact,—to the fact of a party having gone *eo intuitu* to England, for the purpose of committing an act of bankruptcy, to disappoint the previous diligence of Scotch creditors. But there is a great deal of difference in this case, where nine-tenths of the whole creditors are situated in England, and have only claimed as English creditors. I must take this case out of the exception; and therefore, while I decide in favour of the objection to the present sequestration, I reserve to myself to give effect to my opinion against any attempt to evade the law of Scotland.

With regard to the point upon which your Lordships have spoken, whether the awarding of sequestration is a ministerial act, I concur with all of your Lordships in thinking, that the doctrine has been carried a great deal too far. But, if I had sat as Ordinary on the Bills when the application was made, I should have had great difficulty in resisting it, because the awarding of sequestration would not have decided the question. There might have been an application to have the sequestration recalled, and then your Lordships would have just considered what is now stated. I must own, therefore, that, at present, I should have felt myself imperiously called upon to award sequestration. I agree, that it is unnecessary now to enter into any such discussion. I don't think that you are in all cases to shut your eyes to the facts, or that a sequestration must necessarily be awarded when applied

for. It is undoubtedly competent to any one creditor to 1813.
oppose it, and certainly the assignees have a clear right to 
do so.

With regard to the preliminary objections, they are not *hujus loci*. It is impossible to listen to any doubt of the existence of the commission: it is quite extravagant.

As to the other matters, it is not necessary to say much. We are not now called upon to investigate them more minutely. The decision in the case of Struthers, which established that a commission carries all the moveables, cannot, in my opinion, receive fair effect, unless we find that a commission of bankrupt, being prior in date, supersedes any sequestration. There is a great deal said as to the impropriety of proceedings in the suing out of the commissions. Now, it is most strange that, if the Royal Bank are convinced of that, they do not petition the Chancellor, and obtain a deliberate judgment upon the question, whether the commission has been duly issued or not. It is a point which can only be tried there; and I own I am surprised that, with all their strong averments, they do not attempt to bring the matter to a hearing. This can only proceed from their own knowledge that the opinions received are against them. If there are any grounds for their averments, could they not have been decided by the Lord Chancellor, when they withdrew the application? Indeed, the case appears to me to be still open to have the commission recalled. But I don't think we can try that question. We are bound to hold that the commission is well issued, and to give effect to it accordingly. With regard to the case of Struthers, it does not

1813. appear to me proper to enter into a discussion of the propriety or impropriety of that judgment. It is a precedent binding upon us; and though the matter were still open, I do not agree with the remarks that were made upon that subject.

The Court then pronounced an interlocutor refusing the petition for the Royal Bank, and adhering to their former judgment.

The Court, at the same time, gave judgment in another question depending between the same parties, relative to the effect of the Lord Chancellor's certificate, as a general discharge of all debts contracted prior to the commission. It appears that the Royal Bank held two bills drawn by Scott, Smith, Stein and Company upon, and accepted by Messrs Kensington, Styan and Adams, bankers in London, both which bills were payable in London. The acceptors having become bankrupt, the Royal Bank raised diligence upon the bills, against the Company of Scott, Smith, Stein and Company, and against John Stein and Robert Stein, as individual partners of the Company. Bills of suspension were immediately presented by the Messrs Stein, upon the ground, 1st, That the debts being payable in London, were English debts, and therefore, as a matter of course, were discharged by the Lord Chancellor's certificate; and, 2dly, That all their property and effects having been vested in the assignees under the English commission of bankrupt, where it was open

to their creditors to rank and draw dividends, it would be 1813.
unjust to suffer diligence to proceed against them upon
any debts, whether Scotch or English.

On the other hand, it was contended, that both the drawer and the holders of the bills being resident and domiciled in Scotland, the debts were Scotch debts; and that there was nothing in the circumstance of a commission of bankrupt having been issued against the debtors in England, which ought to operate as a bar to the diligence of Scotch creditors.

The bills of suspension being presented to Lord Meadowbank, Ordinary on the Bills, his Lordship appointed the parties to lodge memorials upon the question, in order to be reported to the Court. Memorials having been accordingly prepared, the point came to be decided at the same time with the general question as to the effect of a commission of bankrupt issued in England prior to any application for sequestration in Scotland.

The following is a note of what passed upon this occasion.

LORD JUSTICE CLERK.

The case of Dickie was just in other words giving effect to the certificate.

LORD MEADOWBANK.

It is clear that this is an English debt. The Messrs

1813. Steins were bound to retire the bills in London, and the Royal Bank could not have been compelled to receive the money in Edinburgh, unless upon payment of the difference of exchange, and all expences. In the case of *Armour versus Campbell*, 21st January 1792, a debt was found to be a Scotch debt, because the bill, though drawn in New York, was payable in Scotland, and even though not accepted by the drawers here; and in that case, payment was allowed to be recovered by diligence against the drawer's effects here, notwithstanding a judicial discharge in America.

LORD ROBERTSON.

If the English commission carries the whole effects, wherever situated, it really follows, almost by necessary consequence, that the certificate must operate as a discharge, otherwise you would place the debtor in this situation, that while you allow the whole effects to be carried off by the English commission, you, at the same time, give personal diligence against him for payment of his debts.

LORD JUSTICE CLERK.

The sustaining the certificate must follow, as a necessary consequence, from giving effect to the commission.

LORD ROBERTSON.

All the authorities quoted by the Bank were prior to the case of *Struthers*.


The Court then pronounced an interlocutor suspending the letters *simpliciter*; in other words, finding that no diligence could proceed upon the bills. 1813.

Counsel for the Royal Bank—Solicitor-General Monypenny, Bell, M'Conochie; Agents, Andersons and Russel. Counsel for the Messrs Stein—Clerk, Cranstoun, Skene; Agents, Gibson, Christie and Wardlaw.

*(SECOND DIVISION.)***THE CASE**

OF

MRS MARY WARDLAW CUMMING,**SOME TIME SPOUSE OF THE LATE ARTHUR FORBES, ESQ. OF CULLODEN, AND AFTER-
WARDS OF JOSEPH EGERTON, ESQ. OF LONDON, AND HIM FOR HIS INTEREST,****AGAINST****GEORGE DUNCAN FORBES, ESQ.****OF CULLODEN.**

1811.  **THE** late Mr Forbes of Culloden was twice married; first to Mrs Sarah Straton, and afterwards to Mrs Mary Cumming, eldest daughter of the late Colonel Sir John Cumming.

By his first contract of marriage, Mr Forbes executed an entail in favour of the heirs male of the marriage, and certain other substitutes. Of this marriage, the issue was, George Duncan Forbes, Esq. now of Culloden.

By the second contract of marriage with Mrs Mary Cumming, Mr Forbes became bound to infest her, in case of her survivance, in certain locality lands; under this provision, that it should be in the power of the heir of

Culloden for the time being, to enter to these lands, upon 1811. paying to the widow a liferent annuity of L. 700 per annum. ~~~~~

On the other hand, Mrs Mary Cumming assigned and made over to her intended husband all her right and interest in the sum of L. 7000 stock belonging to her, under the condition, that in case of the dissolution of the marriage without children, she should have the power of disposing of the sum of L. 2000 at her death, by a writing under her hand, executed at any time of her life, or even on deathbed. This was the only subject conveyed by the lady in the contract of marriage. The contract contained no general clause, making over any effects or interest that might afterwards accrue to her.

Lady Cumming, the widow of Colonel Sir John Cumming, and the mother of Mrs Forbes, had her ordinary residence in Edinburgh, having a dwelling-house in that city, and a villa in the neighbourhood. In July 1802, her Ladyship went to Bath for the benefit of her health; which continued to decline, however; and in the month of January following, she died at Bath, leaving five children besides Mrs Forbes, and without having made any settlement of affairs.

At this time, she had effects both in England and in Scotland. The effects in England consisted of L. 5333. 6s. 8d. stock, and certain jewels in her possession; and in Scotland, besides the real property of the villa near Edinburgh, she had her household furniture, a balance of L. 1977 on account-current, due to her by Messrs Man-

1811. field, Ramsay and Company; and several other articles of inferior value.

In January 1803, when her ladyship died, her eldest son, Colonel Henry John Cumming, happened to be in England; and on the 7th of February, he took out letters of administration from the Prerogative Court of Canterbury, in character of her 'lawful son, and one of her next of kin,' authorising him to call in and administer her personal estate. It does not appear with what precise view this step was taken by Colonel Cumming; but it is certain that it was not in consequence of any communication with the other nearest of kin, from whom he had no authority of any sort to act for them. No inventories were lodged by him in the Prerogative Court, but he granted a commission to certain gentlemen in London to manage and collect the English part of his mother's effects. These gentlemen accordingly proceeded to collect the funds; and in this way they received payment of certain arrears of Lady Cumming's jointure, and of the dividends on the stock. The whole funds realised were divided in six shares, three of which were transferred in the books of the Bank of England into the names of three of Lady Cumming's children; but the share of Mrs Forbes of Culloden, and of the remaining two children, were not entered or transferred in any form. Colonel Cumming afterwards collated the heritage, with his brothers and sisters, and agreed that the whole succession should be equally divided among them; for which purpose an agent was appointed to collect and realize the property in Scotland, where the necessary steps were also taken for having the Colonel confirmed executor to the deceased, for be-

hoof of all concerned. The parties afterwards subscribed a joint letter, agreeing to a reference of their respective interests to two eminent counsel; but these gentlemen having differed in opinion, nothing followed upon the reference. 1811.

At the time of Lady Cumming's death, Mr Forbes of Culloden was alive, but he died in four months thereafter, without having made up any title in the person of Mrs Forbes to her share of her mother's succession, or taken any steps to obtain actual possession of the funds. He was succeeded by his son, George Duncan Forbes, Esq.; and Mrs Forbes was afterwards married to Joseph Egerton, Esq. of London, who laid claim to her share of Lady Cumming's succession, upon the ground, that no title to it having been completed, nor any possession obtained during the life of her late husband, the right had never been vested in her, but was carried by the assignation consequent upon her second marriage. On the other hand, it was contended by Mr Forbes, that the right in question being merely personal, had fallen under the *jus mariti* of his father, and ought now to belong to him, as his father's representative.

In this situation, Mrs Egerton, with consent of her husband, brought a declaratory action before the Court of Session, for ascertaining her right to her share of Lady Cumming's succession, and concluding also against her brother, Colonel Cumming, for payment. In defence to this action, Mr Forbes insisted upon his right to the money, in virtue of the plea which has been just stated; and the question having come before Lord Robertson as Ordinary, his Lordship, after hearing the parties, pronounced a

1811. judgment, finding, that the late Lady Cumming was domiciled in Scotland; that, as she died intestate, the succession to her moveable estate, wherever situated, must be regulated by the law of Scotland; that Mrs Egerton, as one of the nearest in kin, had right to an equal share with the others of the free moveable estate; and as she had not made up titles to such share by confirmation, nor had attained possession of any part thereof prior to the decease of her former husband, repelling the defences, and decerning in her favour for payment.

Against this judgment Mr Forbes represented, founding strongly upon the decision in the case of Lady Pulteney against Miss Stewart (18th December 1807), the import of which was held to be, that confirmation was not necessary to reduce the share of a succession under the *jus mariti*. This representation was followed with answers for Mrs Egerton; and, upon advising these papers, the Lord Ordinary reported the case to the Second Division of the Court, and appointed the parties to prepare memorials; which having been accordingly lodged, were advised on the 21st February 1811; upon which occasion, the following opinions were delivered:

LORD ROBERTSON.

The reason why I took this case to report is, that the decision in the case of Lady Pulteney is founded on, and I did not chuse to take it upon me to pronounce an interlocutor in the face of a judgment of the Court.

LORD MEADOWBANK.

The only difficulty certainly arises from the case of

Pulteney, which I find Lord Glenlee concurs with me in 1811. thinking a case very ill reported. It went entirely upon the special circumstances of the case. I spoke to his Lordship on the subject, and we don't differ one iota. The decision went entirely on this, that Andrew Stewart having acquired the *dominium* during the dependence of the submission, it was understood that an obligation was contracted by Lady Pulteney, that would compel her to convey to his representative the benefit of the succession. I was extremely against the judgment. I thought she never was in a situation to have contracted any obligation; and that the proceedings never could be reared up to signify any thing against her. Mr Rolland strongly disapproved of the argument; and I wish it recorded by the gentlemen reporters, that I think it a bad decision, and erroneously reported. It is one of those judgments that I have always set my face against, as tending to shatter the law of Scotland from top to bottom. It is of most dangerous consequence to shake great principles of law upon little trifling particulars. I never saw less sense stated in any report. Was ever any thing more absurd, than to tell me that personal property unconfirmed, can go to the heirs or representatives? It can neither be assigned nor adjudged. It is neither a personal nor a real right. It is not a right at all. What is the import of the assignation by the wife which arises upon the marriage. It is to convey her rights of property, her *nomina debitorum*. But, is it possible to say that she had any, (merely because her father died) until she took up the succession. The truth is, that the Court were misled by some loose notion of equity, though, certainly the equity lay the other way, because Lady Pulteney ought not, by her husband's death,

1811. to be choused out of her father's succession. I observe too, that the parties were never at the trouble to reclaim; and the real fact of the matter is, that Sir W. Pulteney being a man of great fortune, nobody cared about the decision, otherwise the party would have relaimed, and the judgment must have been altered. I lay that case entirely out of view, as I have no idea of any Judge pretending to go upon the assignation of a subject that is not assignable. The wife assigns her property, but untill this right is made good, it is not worth a farthing. What could she have assigned? She had just a right of succession not completed. You are not entitled to say that she neglected to make up titles. It is the husband who is the manager of the common fund, but the wife is not bound to warrant his neglects. We all know, that if the wife contract debt before marriage, and if the creditor neglect to constitute that debt against the husband during the coverture, he cannot come against him afterwards. There is no *delegatio* during marriage. The creditor must take the golden opportunity of constituting the debt while the marriage subsists. It is an opportunity given by the law, in consequence of the right of administration enjoyed by the husband, and the moment that is over, he has no more connection with it. It arises from his being the manager, or *dominus* of the copartnery, and when that ceases, his power and all its consequences cease also. There are some very material doctrines involved here. Your Lordships see, that this is a succession, that must be regulated by the law of Scotland, but a great deal of the subject must be levied in England. Had Mrs Egerton been confirmed during her marriage with Mr Forbes, still she had no right to levy or compel

payment in England. She must have produced her 1811. Scotch confirmation to obtain the letters of administration there. It is that which gives her the right of possession: I mean the letters of administration. She might indeed have transmitted the property to her descendants, because it is now held, that in succession the legal transference operates *ipso jure*, as in marriage. If a man marries a Scotch heiress in London, her personal property will be transferred *ipso jure*, but the right of exaction, of compelling payment, must be regulated by the law of the place. Now, I suspect that Mrs Egerton had no claim to the succession in England; for Colonel Cumming, who was the factor, or attorney, or at least *negotiorum gestor*, for the whole nearest of kin, had taken out letters of administration. This vested in him the actual subject as trustee for all having interest in the succession. It gave him possession of the personal estate of Lady Cumming in England: the right of exaction and of compelling payment. That being the case, I apprehend, that though there was no confirmation in Scotland, yet possession has been thereby so far attained for whoever of the nearest of kin are then in life; and the consequence is, that this right transmits to their descendants. By having attained the possession, or which amounts to the same thing, the legal possession by the letters of administration, all the nearest of kin for whom Colonel Cumming acted must be considered as vested with the right of the English succession, and consequently Mr Forbes, the husband of Mrs Forbes, with the right of her share of it. The omitting to obtain confirmation in Scotland has this effect, that if nothing had been done in England, it would have entirely prevented the transmis-

1811. sion; but by the letters of administration, taken out in England, part of the succession became vested, and must be transmitted. The general principle of law is, that the succession remains in *bonis defuncti*, subject to the law of the domicile; but, as there was part of it the possession of which was obtained, that must transmit upon the same principle. The fact of the actual attainment of possession is not stated so precisely as could have been wished. It is not said, at what date it was attained by Colonel Cumming. The Scotch succession, it seems, consisted partly of moveables; and if possession of these was attained by Colonel Cumming, I should think there must be a great deal even of it that must be comprehended by the same principle; because if during Mr Forbes' life, Colonel Cumming likewise attained a certain possession in Scotland, along with his possession in England—

LORD ROBERTSON.

This was long after Mr Forbes' death.

LORD MEADOWBANK.

The principle I am going upon, is the actual attainment of possession upon a trust. It was attained by their trustee acting in their behalf. Your Lordships may find generally, that the letters of administration taken out in England by Colonel Cumming, on account of the whole nearest of kin, did of course transmit so much as was in England, and *quoad ultra*, you may remit to the Lord Ordinary to proceed as he shall see cause.


LORD JUSTICE CLERK (HOPE.)

1811.

This case puzzled me a good deal, because I was not present when the case of Pulteney was decided, and was not aware how far any specialty had entered into the consideration of the Court; although I have marked here, that if the case was fairly decided upon the grounds of law stated in the report, I did not see how I could disturb it. I thought it a bad decision, because I cannot see how a man can have a better right of succeeding through his wife than *proprio jure*, but finding that this case does not stand in the way, I have no difficulty in the present. There may be some difficulty indeed with regard to the point stated by Lord Meadowbank, unless it could be made out, that Colonel Cumming acted by special mandate of Mrs Forbes; for otherwise, this would not be for her benefit, but to her prejudice. If there had been a special mandate to vest it in herself, I should have had no objection to it; but here this *negotiorum gestor* is acting to the prejudice of his constituent, or the person whom he represents. Colonel Cumming, I suppose, never imagined that he was acting for the benefit of all parties, and probably just took out letters of administration, without thinking more about the matter, than that it was a proper step under all circumstances. Therefore, though I concur in the general rule of law as stated by Lord Meadowbank, I have very great doubts, indeed, how far we can apply that doctrine, where there is no special mandate; when it is not clear with what views Colonel Cumming acted, and when his conduct is attempted to be construed to the prejudice of the party whom he is said to have represented.

1811. The Court then pronounced a judgment, finding that the late Lady Cumming was domiciled in Scotland, and that as she died intestate, the succession to her whole moveable estate must be regulated by the law of Scotland, but appointing the parties, before farther procedure, to give in memorials upon the question, whether the letters of administration, taken out by Colonel Cumming, had the effect of vesting in his sister, Mrs Forbes, her share of the moveable estate of her mother, recoverable in England, so as to take the same out of the *hereditas jacens* of her mother, and subject it to the legal assignation by her marriage, in favour of Mr Forbes.

In obedience to this appointment, memorials were prepared for the parties, upon the question suggested by the Court, in which it was contended for the pursuer, Mrs Egerton, that by the law of England, there is a material distinction betwixt an executor by will, who obtains a probate thereof in the proper court, and a mere administrator, who is appointed to call in and distribute the moveable estate of a person dying intestate. The former is considered as enjoying the full right which is vested by the law of Scotland, in an executor duly confirmed; but the latter has, properly speaking, no right, but an office by which he can acquire no interest in the succession, nor any thing beyond the legal title to collect the funds, subject to the obligation of distributing these when recovered. The act of administration fixes only the official character of him who administers, and leaves the rights of all concerned in the succession to stand upon their own grounds. Accordingly, the letters of administration may be granted either for collecting the whole, or a part of the defunct's

estate; they may be revoked or set aside, upon a variety 1811.
of grounds, in which case the Ordinary may make a new 
appointment, and they fall to the ground by the death of
the administrator; whereas a proper executor nominate
transmits his right to his own executor upon his death.
Blackstone, b. 2, cap. 32. Bacon's abridgement, Voce Ex-
ecutors, sec. 4.; Hudson *versus* Hudson, 7th Nov. 1737,
Atkin's Reports, vol. 1. p. 460.

The conclusion from these authorities was maintained to be, that the mere taking out of letters of administra-
tion, even when followed up by lodging inventories of the
estate, can vest nothing; and that no transfer of the right
takes place until the effects be reduced into the adminis-
trator's actual possession. But as a very small part of
the estate was recovered by Colonel Cumming, the re-
mainder remained in Lady Cumming's *hereditas jacens*,
liable to be taken up by the pursuer as her separate pro-
perty, to the exclusion of her husband's representatives.
Farther, it was argued, that in this matter Colonel Cum-
ming was to be considered merely as a *negotiorum gestor*,
and consequently could not bind the party for whom he
acted, unless his management were beneficial; for if any
act or deed done by one person for another who is absent,
be positively detrimental to the latter, he may entirely dis-
regard it as unwarranted and ineffectual. Dig. lib. 3. t. 5.
l. 10. sec. 1. Stair b. 1. t. 8. sec. 3.

On the other hand, the defender, Mr Forbes, contend-
ed, upon the authority of the decision in the case of Lady
Pulteney, that the whole of the pursuer's share of the suc-
cession became vested in the late Mr Forbes, *jure mariti*,

1811. and that no confirmation was necessary to complete his right. It had been said that the case of Pukteney was decided upon specialties, and it was certain that some of the Judges had been moved by specialties, but a majority delivered opinions upon the general question of law; and in proof of this, reference was made to the following notes of the Judge who then presided in the Court, and which were written in his own handwriting, upon one of the papers in the cause, ‘*Jus mariti*. Sir William Stirling died in July 1799, and Mr Stewart in May 1801. Submission signed by Mr Stewart. In what character? Funds to bear interest from Martinmas 1799. How did the possession stand at and before Stewart’s death? Did he receive in interest, or rents, or dividends? Did he take no share in management? Look at submission and decret arbitral. Mrs Dundas’s letters of administration cuts off management. Mrs Stewart’s right as one of the nearest in kin, and of being confirmed as such, vested in her husband *jure mariti*. This was made complete and effectual, by her being afterwards confirmed, and the title so made up, operated *retro*. Besides, either Mrs Stewart or her husband, or somebody for them, were in possession during all the two years that Mrs Stewart survived Sir William Stirling, and possession is sufficient.’

From these notes, it was held to be clear, that the Judge who then filled the Chair, delivered an opinion upon the general point of law. But, at any rate, the specialties referred to were; 1st, That during the life of the husband, there had been a submission of the question; and 2^{dly}, That after his death, there had been a possession of

some part of the property, in consequence of a decree-ar- 1811.
 bitral. Now, in the present case, the very same special-
 ties occurred, since there had been a submission to counsel,
 during Mr Forbes's life, as well as an actual possession of
 part of the funds by Colonel Cumming.

But although this decision were not to be held as an authority for finding that the whole of the pursuer's share in Lady Cumming's succession was vested in the late Mr Forbes during his life; it was argued, that at least the English effects must be carried by the actual possession acquired by Colonel Cumming under the letters of administration, by which he was in fact constituted a trustee for behoof of all having interest in the funds. He could not manage these matters personally, but he granted a commission to certain gentlemen in London, to collect and realise the funds, and the possession thus obtained, was a *pro indiviso* possession on the part of the whole next of kin; and consequently a possession by the pursuer of her share, or rather a possession by her late husband before his death. But it is a settled point, that the actual possession of moveables supersedes the necessity of confirmation; and possession by a factor or *negotiorum gestor*, is equivalent to an actual possession by the party. Erskine, b. 3. tit. 9. sec. 30. b. 2. tit. 2. sec. 22.

Upon advising these memorials, the Court thought it necessary to require the opinion of English counsel upon certain points in the law of England; and a case having been made up under the direction of the Lord Ordinary,

1811. was laid before Sir Samuel Romilly, and John Bell, Esq.
for their opinion upon the following queries :

1st. Whether, previously to taking out administration (as in this case) by one of several persons, equally next of kindred to the deceased, the shares of the moveable succession descending to each, is transmissible by their assignment, or by their will, or attachable by the diligence of their creditors, although dying before administration is so taken out?

2d. Whether the taking out of administration, although the funds had not been as yet recovered by the administrator, would be attended with the above effects, or any of them, or in any other way augment or strengthen the powers of disposal of those of the nearest of kindred, who were not themselves the administrator?

3d. Supposing this case were to be governed by the law of England, whether Mrs Forbes' share of her mother's property, remaining under the care of the administrator, and otherwise untouched by her, or her first husband, during his life, did by law pass to that husband, as in her right, so as to become his, and pass to his representatives? Or whether, notwithstanding Colonel Cumming's administration, the right to her share of the succession continues with herself exclusively, as if she had been a single woman, and not the wife of Mr Forbes?

To these queries Sir Samuel Romilly returned the following answers, in which Mr Bell substantially concurred.

1st. By the law of England, the shares of the next of kin of a person who has died intestate in his personal estate, or moveable succession, are vested in such next of kin, previous to administration being taken out, and are transmissible by assignment or will; and in default of such disposition, will pass to their personal representatives, and are applicable to payment of their debts.

2d. The taking out administration will not strengthen, or in any manner alter or affect, the rights of these next of kin to whom the administration is not granted.

3d. If this case were to be governed by the law of England, Mrs Forbes's share of her mother's personal estate would not have passed by law to her first husband, but would have remained her absolute property, as if she had been a single woman. Mrs Forbes's interest was according to the law of England, only a choice in action, which, although transmissible to representatives, does not vest in a husband *jure mariti*, but will continue the wife's, unless the husband reduces it into possession by making an assignment of it.

Upon the memorials accompanied by these opinions, the case was advised by the Court, upon the 13th May 1812, when the following opinions were delivered.

LORD GLENLEE.

I was not present at the first judgment in this case; but, from the memorials, I see that a reference has been made to English counsel, in consequence of the allega-

1812. tion, that owing to the letters of administration, it was no longer requisite for this lady to make up any title whatever, in her own person, to the effects of the deceased that fell under the administration ; that she was in the same situation as she would have been in with regard to effects in Scotland, where another person had obtained a confirmation. The consequence of such a proceeding would have been, that all parties interested in the succession, had a right of action against the party confirming ; and that this right against him would have been transferred to, and vested in the husband *jure mariti* ; I mean the right of calling the executor, or party confirming, to account ; for the share of the succession vests in all of them from the moment that a confirmation is expedite by any of them. I understood this allegation, as to the effect of letters of administration, was the question upon which the opinions of English counsel were to be given. I do not think the opinions embrace this question, though it is clearly implied, that from the moment the letters of administration were expedite, this lady had a right of action against the executor to force him to account ; and that this right immediately vested. I don't say that any right to the property vested ; but simply the right to call the executor to account. This appears to be the import of the opinions of the English counsel ; and it does not appear that they hold any express title necessary, otherwise the opposite party would have suggested some distinct query upon that point. Considering what is said upon the subject, indeed, I incline to think that there was no occasion for a separate title. I shall not say whether the case of Pulteney was well or ill decided. It was certainly doubtful ; but I incline to give the greatest

facility to the vesting of rights in the wife. It may be 1812
hard in this case ; but it would be much harder in general, if the matter were otherwise. Things might have happened differently here. The case might have been, that the lady died having issue ; and, according to the opposite view of the matter, these children would not have touched one farthing of the succession.


LORD MEADOWBANK,


This case does not appear to me to be the same with the case of Pulteney ; and, notwithstanding what is stated as to the opinions of a learned Judge, I have no doubt about that case ;—None whatever. I know that Sir Ilay Campbell threw out general views ; but the Court went upon circumstances, some upon one, some upon another, and not at all upon the general question. In fact, these opinions that are quoted, admit (every one of them) of the most complete confutation. They are subtle and ingenious to be sure, but the law of Scotland is not so feeble as to be shaken by ingenuity. Sir Ilay states two grounds, quite independent of each other. One ground is, that either Lady Pulteney, then Mrs Stewart, and her husband, were in possession of Sir William Stirling's effects during his life, or some person for them, and, of course, that they were vested in Mr Stewart. But, where is the necessity that any person should be in possession for them ? Is there no such thing as a *hereditas jacens* known in law, which is possessed and intromitted with by no person, but waits the legal *aditio*, either to afford a legal title to claim, or the means of obtaining possession of it. And were we to hold it, at any rate, a legal necessity, that Mr and Mrs

1812. Stewart possessed her father's effects by some other person, since they did not possess them in their own, and decern *per saltum*, without inquiring into the fact?

The other ground is, 'That Mrs Stewart's right, as one of the nearest in kin to her father, and being confirmed as such, vested in her husband *jure mariti*. This was afterwards made complete and effectual, by her afterwards having confirmed,' (i. e. after her husband's death), 'and the title so made operated *retro*.'

There is no sort of doubt, that Mrs Stewart's right, as one of the nearest of kindred to her father, had she in fact been confirmed as such, would have vested in her husband *jure mariti*; because it was then a transmissible and assignable right. But she was not confirmed in her husband's lifetime; and the question therefore was, Was any transmissible interest in her, during her husband's lifetime, that could have been vested in him *jure mariti*? The law says certainly not; for, had she died, nothing would have transmitted to her children, even had she had no husband; and why? Because she had nothing to transmit; she was lying out unentered. She had made no *aditio hæreditatis in mobilibus*. She had, therefore, nothing in her but the *jus sanguinis*, which is not transmissible by assignation, either legal or voluntary. But it is said, that the confirmation expedite by Lady Pulteney, after Mr Stewart's death, operated *retro*. But this implies, that something happened during his life, which this confirmation operated upon *retro*. Now, what was that which happened? She was married when her father died, but that vested nothing in her; and, of course, her mar-

riage assigned as little to her husband. Had she, indeed, 1812.
done so improper a thing as to assign, for an onerous 
cause, an estate which did not belong to her, viz. that
which opened to her by her father's death, but which she
had no title to convey; then, no doubt, when she after-
wards acquired right to that estate *aditione*, viz. by con-
firmation, the assignee would acquire the estate;—*jus aucto-*
ris accrescit successori etsi devolutum post venditum. But,
does the law ever do so improper a thing as to hold, that
a person conveys what does not belong to them by a trans-
missible title? And is there any person would contend,
that either an action would have lain to Mr Stewart's
heir to have compelled Lady Pulteney to confirm, or, if
she had died possessed of a separate fortune, that an ac-
tion, under warrantice of her alleged legal assignation of
her father's succession, would have been competent to
such heir, to recover *id quod interest*, that she had convey-
ed, *sine titulo*, her father's succession, and died without
confirmation? The judgment has not a vestige of foun-
dation, as a decision on the general question; and a very
different sort of discussion than it met with would have
been required to overturn all those established principles
which it runs counter to, were it so considered. But it
is plain, from the very notes in this paper, that, though
these subtle and very unsound views were thrown out,
the learned Judge did not rely on these, but blended
them with the circumstance of Mr Stewart's having en-
tered into a submission, along with his lady's sisters, and
with the loose *dictum*, that Mr and Mrs Stewart either
had attained possession, or some other person had obtain-
ed it for them; and thus the judgment was carried, and now
is set up as an authority in the face of all principles.

1812. Now, here it is established, upon strong evidence, that  Mrs Forbes did acquire during the marriage; that she acquired *ipso jure*; that there was no *aditio hereditatis in mobilibus* requisite; that the mere survivance of her mother enabled her to acquire, and nothing more. But having acquired by the law of England, to be sure this was of no benefit to the husband, unless he availed himself of it. He might have assigned it indeed. He had no want of power. By the law of Scotland, Mrs Forbes had assigned to the husband whatever she could acquire during the marriage. Here she makes a great acquisition during the marriage; and *stante matrimonio* there was an express obligation on her to convey, but it was not necessary; because she had conveyed *ab ante*, and the husband had the right without the assignment, though it is not vested in him unless he uses it.

I suppose that Mr and Mrs Forbes might have done many things that would have been held, by construction, as a possession, and which would have been effectual. There is no doubt that he might have sold it on the Exchange of London. By the law of Scotland, Mrs Forbes had assigned to him,—when she gave him her hand she did so,—all she could acquire during the marriage; and she acquired this fund during the marriage. If I am right here, this would apply to the whole fund. I have no doubt as to the point whether the contract of marriage was special or not, or as to any implied exclusion of the *jus mariti*. I don't care whether the contract was put in the fire or not. It is the law that gives this right; and without the most express exclusion, the legal operation of the law must take place.

In this situation, I need not enter into the other question. Where a proceeding at law is to be construed as the act of a factor it certainly lays a difficulty upon me; and, therefore, I am not fond of considering the letters of administration as the actual possession or occupation of the subject. Suppose he had got possession in virtue of a mandate, we should have held that as superceding confirmation. But this is just like an entail where a person succeeds at once. She takes *vi legis* in England; and what she takes is conveyed by the law of Scotland to Mr Forbes. If she had died and left a child, that child would have taken nothing if it had been in England; but here it would have been the reverse. We should have sustained the *jus representationis*, and brought in the child *pari passu* with his uncle's representatives.

I feel considerable hesitation to lay any stress upon the confirmation; at the same time I don't differ from Lord Glenlee, because the proceeding is at least an operation upon the succession, and it is such an operation as certainly would have entitled Mr Forbes to have gone to England, and called the administrator to account to him, upon producing evidence that the law of Scotland gives him his wife's acquisitions. I require no confirmation, because, unless there were creditors appearing, there is no occasion for it. There was a complete right of action in England, to have brought Colonel Cumming to account. What struck me at first was, that this was a case of an interference of the laws of different countries; the *lex domicilii* affording a title, and the law of England being as stated to us by the authorities.

1812. Upon the whole, if I were called upon to pronounce an interlocutor here, I would just rest it upon this ;—in respect that the marriage gave Mr Forbes a right to all that this lady could acquire during the marriage, and that it appears to be the opinions of English counsel that she did acquire, *ipso jure*, what fell to her by her mother's death, who was domiciled in Scotland ; therefore find, that this fell under the right or conveyance, consequent on the marriage, to Mr Forbes.

LORD BANNATYNE.

I am of opinion, that this case falls to be determined by the law of Scotland. The letters of administration are not necessary, in England, to transmit property from the dead to the living. We are to consider these moveables as situated in Scotland ; it was this lady's domicile ; and I consider nothing, but that her moveable succession has its locality in Scotland. If I am asked how the shares of the succession vested, I answer, that they could not vest without making up a sufficient title by the law of Scotland. I consider the whole matter as depending on the law of Scotland ; and as she did not confirm during her husband's life, the right did not vest by the law of Scotland ; and, not having vested, I am clear that it could not be carried to her husband.

LORD WOODHOUSELEE.

My view of this case, at first, was the same as what has just been stated ; but, upon considering these papers.

and the opinions I have heard delivered, I have come to be of a different opinion, and to think that, in respect Lady Cumming, by the fact of her marriage, did *ipso jure* assign to her husband every thing she might acquire ; and that, by the law of England, this succession by her mother fell to her, and was vested in her person, so as she might have sued the administrator, it falls under the general assignation consequent upon the marriage. 1812.

LORD ROBERTSON.

This case is attended with a good deal of difficulty ; but, upon the whole, my opinion coincides with that of Lord Bannatyne. It is already finally decided that this lady was domiciled in Scotland ; and as she died intestate, it follows, of course, that her whole moveable estate, wherever situated, must be regulated by the law of Scotland. As to those things which are situated in Scotland, there can be no doubt. There has been no confirmation so as to vest them ; but a doubt has been stated with regard to such of them as are situated in England ; and in order to clear up this, your Lordships have had recourse to the opinion of English counsel. Now, it appears that the law of England is very different from the law of Scotland ; because, by the law of England, there is no necessity for confirmation, or any legal step whatever, but the right vests in the next of kin *ipso jure*. But this does not transmit it to others. Now, what is the situation of Mr Forbes ? According to the opinions of some of your Lordships, he is in a better situation than he could have been either in England or Scotland. If he were to go to England, it would not be disputed that the right was vest-

1812 ed; but they would tell him, it does not go to you; it goes to your wife's nearest of kin. In Scotland, on the other hand, he would have been told, the right did not vest in your wife, and therefore cannot belong to you; so that, by a strange jumble of the laws of both countries, which I can neither follow nor understand, your Lordships are about to give him what he could not have obtained either by the one law or the other.

LORD JUSTICE CLERK (BOYLE.)

If this case were to be decided merely upon the authority of the case of Pulteney, I am perfectly clear that that case could not be regarded as a precedent; for, upon the face of the opinion of the learned person presiding in the Court at that time, it appears that he built very considerably upon the special circumstances of the case. I therefore cannot hold that as a judgment upon the abstract point; but, even if it were, I should not have felt myself inclined to go along with that judgment. Considerable difficulty has been occasioned by the appointment to take the opinions of English counsel as to the effect of letters of administration. The questions that have been put, have related to points not so material as those which have not been answered at all; but, from these opinions, I think we are enabled to collect what is the true effect of letters of administration taken out by one of a number of next of kin. It is stated by Mr Bell, in answer to the third query—(*reads a passage from Mr Bell's opinion.*) What I gather from this, is the clear opinion of this counsel, that, by the law of England, one of the next of kin administering, administers for behoof of the whole, and that

any one of them may bring the administrator to account. 1912.
 The letters are a mere form necessary to get possession, and the administrator is accountable to all persons interested in the succession. If this is the fact, then I apprehend, that there was just done here, under the law of England, that which would have been necessary by the law of Scotland, as to effects situated here; that there was vested in Mr Forbes, and all concerned, an acquired right to the corporal possession of the moveables situated in England—a right to call the administrator to account.

The next question is, whether, by the law of Scotland, the marriage was a virtual assignment by the wife, of all she may acquire during the marriage. There was not done in Mr Forbes's life that which is necessary to complete a vested right, and there is certainly room for what was stated by Lord Robertson. But I cannot shut my eyes to this, that the marriage did vest all that she should acquire during its continuance. I admit that this may have a strange appearance. But your Lordships, by requiring the opinions of English counsel, wished to know exactly how the law stood; and if the law is clear that Colonel Cumming's administration was sufficient to vest an equal right in all the next of kin, to compel him to account, we have just got the light which we expected, because, as to the law of Scotland, we would not require any opinion at all.

LORD MEADOWBANK.

If I had held the proposition, that administration would have been requisite to have entitled Mrs Forbes to have

1812. appeared in any court in England, I should agree with my brother. If I thought it necessary for her to come with a confirmation in her hand, to shew that she had a title, I should say that the want of it was a bar to the *ipso jure* transmission; for if you can attain possession without confirmation, you may transmit. If I make any acquisition in a foreign country *ipso jure*, I do the same thing as if I had actual possession in Scotland; I am entitled to found upon it as an *aditio hereditatis in mobilibus*. Now he says, here you acquire by the force of the law of England, a vested right which you had previously by your marriage assigned to me; you acquired it by the law of England, and you was entitled to make this effectual without a confirmation. It was a transmissible right; the law gave you an absolute *aditio hereditatis*. The want of the confirmation is no bar, because, by the principles of the law of England, it operates *ipso jure*. It transmits to the foreigner, producing evidence of the law of Scotland. The certified opinion of the Dean of Faculty, produced in Doctors Commons, would have been sufficient to have obtained a judgment in her favour.

The Court then pronounced judgment in the following terms:

“ *Edinburgh, 19th May 1812.*

“ The Lords having advised the mutual memorials for the parties, with the opinions of the English counsel, and former proceedings in this cause, find, that the pursuer, Mary Wardlaw Cumming, during her marriage with the late Arthur Forbes, did acquire right to a share

of the moveable estate of the late Lady Cumming, her mother, situated in England, as one of the children. And that the same, by the law of England, did vest in her: Find, that said share, by the law of Scotland, did fall and belong to the said Arthur Forbes, *jure mariti*: Therefore, alter the interlocutor of the Lord Ordinary, sustain the defences *quoad* the moveable estate in England, and assoilzie and decern, and remit to the Lord Ordinary to hear the parties farther as to the moveable estate which was situated in Scotland; and to do thereat as he shall see cause."

Against this judgment the pursuer gave in a petition, which was followed with answers; and in these papers the question between the parties assumed rather a new shape, and was argued upon different grounds. For the pursuer, it was, *inter alia*,

Pleaded.—The question relates to the claim of the pursuer, to a share of her mother's succession, and this is opposed by the representative of her late husband, who contends, that the claim fell under the *jus mariti* of his father, and must now belong to him as the heir. The grounds of this plea depend upon certain transactions, which took place in England, and there being thus an apparent *conflictus legum*, the preliminary question is, by what law shall the controversy be settled? But this is a point already fixed by a final judgment of the Court, which not only finds that Lady Cumming died domiciled in Scotland, but recognises the undoubted rule established by a series of adjudged cases, that the moveable succession must be distributed by the law of the domicile,

1812. At the same moment, however, that the law of Scotland is recognised by one judgment, to be the rule of distribution; the judgment under review sets out by finding, that the effects vested in the pursuer by the law of England; and, after all, it returns to the law Scotland, for the purpose of vesting these effects in her husband. But it is clear, that the law of the domicile being once acknowledged as the rule, no other law can be introduced to control the rights of the next of kin; and if the present question had occurred in England, the courts there would not have decided by their own law, but would have enquired into the law of Scotland, and given due effect to it, as the law of the deceased's domicile.—*Thom against Watkins*, Vezey's Reports, vol. 2. p. 35. *Kilpatrick*, Court of Rolls, 1787.—To say that the pursuer or her late husband had a right of action, which vested during his life, to recover the English effects, is a mere assumption, and is besides erroneous; as it is clear, that they could have no right of action in England, unless they had such right in Scotland, which it is admitted they had not. Without a confirmation in Scotland, they could have brought no action in England; because the courts there would have determined all claims and questions relative to the succession by the law of the domicile; and if by that law the pursuer and her late husband had no right of action, they could never have obtained it by resorting to the law of England. It is true, that the courts of foreign countries, where effects are locally situated, are frequently applied to for power or authority to obtain possession of, or to distribute the effects; but these courts do not proceed by their own municipal law; they just adopt the law of the domicile. The letters of ad-

ministration, so much founded on, can have no influence upon the question. They have no analogy to a Scotch confirmation, but merely give a power or license to recover the effects; and the learned counsel who have been consulted in England, have accordingly informed the Court, that such a step will not strengthen, or in any manner alter, or affect the rights of those next of kin, to whom the administration is not granted. From these opinions, it is also clear, that if the present question were to be determined by the law of England, it must necessarily be decided in favour of the pursuer; as it is expressly laid down, that her share of the succession would not, by the law of England, have passed to her first husband, but would have remained her absolute property. On the other hand, there being no confirmation, the same result is clear from the law of Scotland. But it is incompetent for any court, either here or in England, to *splice* the laws of the two countries together, so as to form a rule of succession, acknowledged by the law of neither.

Answered.—There is no occasion to dispute the rule, that intestate succession must be regulated by the law of the domicile; but where it is necessary to recover possession of effects situated in foreign countries, the forms acknowledged by the *lex rei sitæ* must necessarily be combined with the *lex domicilii*. There can be no doubt that, by the law of Scotland, the effects are vested in the next of kin by confirmation, which is just the sentence of a judge authorising an executor to recover and administer the succession for behoof of all having interest. But it is a general rule, that no sentence of any judge can operate *extra territorium*; and although, in questions regarding

1812. matters of right, the decree of a foreign country will receive effect, and be enforced in other countries, provided it contain nothing contrary to the *jus gentium*, yet, so far as concerns the recovering or vesting of property, the decree can only operate *intra territorium*; and in order to get possession of effects situated in other countries, the claimant must use the forms and diligence prescribed by the laws of these countries, and shape his claim according to the same rule. Take the case of a Scotch debtor retiring to England;—his creditor cannot render the debt effectual by Scotch diligence, but must take such remedies, either against the person or effects, as the law of England provides; and in like manner, a Scotch confirmation can confer no more right to recover English effects, than execution issued in Scotland could avail to attach the person or effects of a person resident in England. Erskine, b. 3. tit. 2. §. 22; Kilkerran, p. 207, Fraser; Kames's Principles of Equity, II. 377. Confirmation, therefore, not extending to, and giving no right to recover the effects in England, it is plain that all questions as to the vesting or possession of these effects must be regulated by the law of England. By that law, the effects vest in the next of kin *ipso jure*, without any form whatever; and as, at any rate, letters of administration were actually applied for and obtained in the present case, and possession recovered by virtue of them, it follows, that the effects must be held to have vested in the whole next of kin. Letters of administration being the only form in England corresponding to confirmation in Scotland, ought, in questions like the present, to receive the same, or analogous effects.


Other points were pleaded on both sides, of which it does not seem necessary to take particular notice. The Court, in the first place, directed a farther reference to be made to the opinions of English counsel; and upon advising the whole cause, on the 27th November 1812, they delivered their opinions as follows.

LORD MEADOWBANK.

This case is one of great importance to international law in point of precedent, and in that view also it goes to a great extent in point of pecuniary value. At present all monied people have funds in the national stock. This is subject to the *lex domicilii* of the owner as to intestate succession. The very simple case will often happen, that a person dies domiciled in Scotland, leaving children and a widow. These children have claims to *legitim*, and deads part, and the widow to her *jus relictæ*. One of the children dies without confirmation; and then the question arises,—Was the interest of this person in the English funds a vested interest, so as to transmit his share to his children, or other representatives? or is there any thing else in the structure of the law of England, as to the mode of recovery of the personal estates of defuncts, that would enable our law, in consistency with its own principles, to hold the interest in the dying child a transmissible interest, though no confirmation had been expedite in Scotland during his survivance. This is the most extensive possible question. It goes far into the ultimate principles of law. Whether the *lex domicilii* in moveables operates authoritatively *ultra territorium*, or is merely matter of evidence to be proved to the courts of

1812. justice of the *lex rei sitæ* how the law of the defunct's domicile would destine his succession.

It is held by Mrs Egerton, that confirmation is the *aditio hereditatis in mobilibus*; that it operates upon the *universitas* of the succession; that it is essential to the law of the domicile to transmit the succession from the dead to the living; and that without this no foreign court is entitled to allow any person interested to recover the succession actually existing within its own territory. That is the doctrine that is maintained, and a most serious doctrine it is; for, I am well advised, when I tell your Lordships, that there is not an instance to be quoted, where the courts of justice of England have required confirmation as a requisite to entitle nearest of kindred to sue the administrator, or obtain judgment against him for distribution. It is therefore a novelty that is now pleaded to us; and I cannot allow, that the counsel for Mrs Egerton was correct in saying that the *onus probandi* lies on the other side; on the contrary, I think he is bound to obviate this fact, that no court in Westminster-Hall has ever stopped proceedings to wait for a confirmation, as the warrant of a title to pursue, to compel distribution. As to the expression that was used by high authority, and upon which the counsel for Mrs Egerton has rung the chimes, and supposes it to be true universally, that the moveable subject of a person, wherever situated, is to be considered as situated under the *lex domicilii*; I admit it in one sense, I deny it in another. I admit the law of the domicile determines the person having interest, the person *quam maxime amasse defunctus censetur*, &c. the

person entitled by the presumed will of the defunct to 1812.
claim his succession, wherever situated, *habili modo*. 

In that sense, the succession is situated within the law of the domicile ; but I apprehend that, without exception, it is so situate in no other sense whatever. Will it be contended, that the *lex domicilii* operates *ultra territorium*, either by its imperial or magisterial authority ? No ! No authority whatever ; but it confers substantial rights, and these will be carried into execution where the principles of the laws of civilized countries are understood. The case that I put a few minutes ago is most common. A person dies leaving a widow and children. The children and widow, according to our notions, have a joint interest with the defunct in the *legitim* and *jus relictæ* ; and, as survivors, take *ipso jure* two-thirds of the succession. They require no confirmation. They take *ipso jure*. It is their own ; but will any person say, that though such is the law of Scotland, they could obtain directly a transfer of their two-thirds of stock in the funds, or be able to exact payment of two-thirds of any other personal estate in England. I apprehend they would not. They could not recover a particle of it ; they must purchase letters of administration in Doctors Commons, and the administrator would be liable to recover and account to them. He is bound to account fairly ; and he accounts to them because the law of Scotland gives them the *legitim* and *jus relictæ*. It is not an emanation from the law of Scotland that will operate upon the stock in the national funds. It is no secret pervading influence from the *vis insita* of the law of Scotland that binds personal estate in

1812. England. It is the authoritative influence of a judgment in Westminster-Hall which binds in England; but neither will it bind in Scotland. A judicial transfer operates no further than the territory.

I believe the single exception to this universal rule has taken place only since I sat on the Bench. I look upon it as an anomaly, though dictated by the most imperious expediency. We decided that the judicial transfer, under the statutes of bankruptcy, now operates on this side the Tweed, so as to bar subsequent arrestments. The bankrupt's effects in Scotland are held vested in the English assignees, by an emanation of influence from the law of England; so that the arresting creditors take nothing by their arrestment. I shall say little as to these decisions; because I don't think they can alter generally the rules of international law. They were plainly suggested by a feeling of the strongest expediency;—that systems, contrived for the winding up of bankrupt estates in any one civilized country, should operate universally, and not be counteracted, or deranged, by systems for similar purposes in other countries, or by the ordinary course of separate diligence in other countries; and there can be little doubt, that the respect felt for the authority of British acts of Parliament throughout the empire, must have rendered the Courts here more ready to adopt the doctrines on this subject, which had already been previously received at Westminster; and to which in England they must, no doubt, have been the more inclined, that they have there no diligence in general use, analagous to the attaching powers of our arrestments.

I refer, however, to all the previous decisions in this country, between English commissions of bankrupt and creditors following separate measures, as correctly illustrative of the true doctrines of international law. The Chancellor's commission was held to afford a title to pursue the debtors of the bankrupt in Scotland, and recover his effects here. But if a creditor had sued out diligence, and attached the bankrupt's effects by arrestment, upon a dependence, before the assigns under a commission had put the Scotch Magistracy in motion, and instituted a claim by an intimated action, so as to render the subject litigious, the creditor was preferred to the commission, on the obvious ground, that the transfer, by authority of the law of England, did not operate *ipso jure ultra territorium*, but only by authority of the *lex rei sitæ*, when properly called upon to act. 1812.

Now, let us consider whether there is any thing in the transmission of personal estate from the dead to the living in this country, which would require an *aditio hæreditatis* here, in order to be exhibited at Westminster-Hall; and remedy the alleged blundering practice there, of compelling distribution without calling for any such *aditio hæreditatis*.

In the first place, I must say, that as far as I am instructed, neither the general law of Europe, nor the municipal law of Scotland, ascribes a *universitas* to moveable succession. No person is rendered *eadem persona cum defuncto* by taking such a succession. The nearest of kin is only liable *in valorem* of his intromissions; and I must here take notice, that there is a material mistake in the

1812. printed arguments of the parties on this subject. An universal liability for the defunct's debts is stated on the part of Mrs Egerton, as the effect of taking moveable succession; and this doctrine is reasoned upon, as if it were true, in the paper by Mr Forbes. These are palpable mistakes. The passive title of vicious intromission, instead of being a quality of the legitimate succession, was rather a protection to it, viz. by punishing depredation by whomsoever committed. Moveable succession, I believe, stands universally over Europe at common law, on the same footing as in Scotland. The tripartite division between the children, the widow, and the deceased, was universal; and the deceased's share went into the hands of the ordinary, as a judicial trustee for executing the deceased's intentions in his last moments, employing it as far as requisite for the benefit of his soul, and distributing the remainder among those best entitled. In this way there is no universal representation imputable to any person; and in the improved state of our law, creditors now administer as well as nearest of kindred.

It is plain, therefore, that the law of Scotland entertains no jealousy of any risk arising from an *ipso jure* transmission of moveable succession. In the ordinary case, again, Lord Stair lays it down, that gifts are acquired even *ignoranti*, when no obligation beyond the benefit would be *incurred* by the acquisition; and accordingly the law of Scotland holds the succession vested *ipso jure*; and that even in a person ignorant of the devolution; if while nearest of kin he happen to be in the occupation of the subject that descended to him, or held a *jus ad rem* with respect to it. Thus, if he happens to be debtor to the de-

funct, the debt is extinguished *confusione* ; and if he held, 1812.
as trustee, debts due to the defunct, there is no occasion
for confirmation to transmit to himself a vested interest,
which was already in him as trustee. In short, if peo-
ple pay to him voluntarily, or deliver over to him, the
moveables, all this is good, and no confirmation is requir-
ed. If he obtain a *novatio debiti* voluntarily, a bond of
corroboration for instance, as an additional security, that
vests the right sufficiently. But there is in all these cases
no general *aditio hæreditatis* ; no *universitas*, (did a *univer-*
sitas exist) is vested, because so much only is vested as is
laid hold of and no more.

Now, when you have considered all this, you have on-
ly to consider farther, what is confirmation ? It is the
sentence of a Scotch Judge upon an *ex parte* proceeding.
It is matter of good evidence to ascertain the propinqui-
ty and the right ; and may be exhibited as evidence to
that effect. But any other evidence will do just as well.
The Courts of England will take evidence by the opinions
of counsel, and from parish records, and credible witness-
es ; and this will serve in England all the purposes of a
confirmation. They have hitherto done so ; and no *dic-*
tum of any one Judge has altered that practice.

Now, confirmation being no more than a judicial pro-
ceeding to ascertain the claims of individuals, and rules of
succession in Scotland, and recognising their title to sue
and recover the property there, and being mere matter of
evidence in England, you are now prepared for the ques-
tion, whether, in considering the law of England, you do
not there find what is equivalent to confirmation, and



1812. held to be so by the law of the defunct's domicile, the law of Scotland. We have two circumstances as to which there is no doubt: 1st, It is established, that, by the law of England, there is an *ipso*-vested interest, arising *ex vi legis*, ascribed to the nearest of kin, in their share of the defunct's estate, and which is tantamount to our own doctrines, as to the transmission of the *legitim* and the *jus relictæ*. There is only this difference, that, though the interest is vested, it does not entitle to recover from third parties, except through the hands of the judicial administrator; 2dly, There is also this circumstance, and it is a very material one, that the administration gives a right to recover, and affords a *jus actionis* to the nearest of kin to compel distribution. It affords a direct *jus actionis* against the administrator to distribute. Now, is it possible to believe, that, on account of the loose figurative expression, that moveables follow the person, and that you are to consider the succession as situate in Scotland, it will follow, that this *ipso jure* vested interest does not take place in England, in the case of persons leaving effects there, but dying domiciled abroad? There is the best evidence that it does take place. The *imperium* of the law of Scotland does not go beyond the Tweed; but the law of England affords principles of its own for accomplishing succession, the benefit of which should belong to all equally, whether natives or foreigners. What then shall, in such a case, suspend the ordinary energies of the law of England? If our *ipso jure* transmission of the *legitim* and *jus relictæ* does not reach English property descending to the Scots widow and child, from the defect of power of a foreign law, must not the principle of *ipso jure* vesting, belonging to the law of England, operate as

a necessary result of its own *imperium*? I conceive, 1812. therefore, that it will impute to Mrs Forbes a vested interest in the succession: it will impute to Mr Forbes a *jus actionis* to compel Colonel Cumming to distribute. Holding that to be clear and undeniable, you are to consider what, in my opinion, forms the only difficulty in the case. It is a difficulty that results from a peculiar subtlety in the law of England, by which they consider a *jus actionis* as not assignable at common law. Mrs Forbes, I suppose, had unquestionably a vested interest in her share, and a *jus actionis* to compel her brother to distribute. Mr Forbes, again, had the title of thinking and acting for her and himself. Had he done any thing; had he assigned over the succession among his own creditors, that would be held to have been an act of Mrs Forbes, which the Court of Chancery would have enforced; for there, I believe, lies the peculiar subtlety, that the right, though not assignable, may, if nevertheless assigned, be enforced in equity. But Mr Forbes dies *re infecta*. The thinking mind, that might have acted in right of his wife, is extinguished. She must think for herself now, or get another husband to think for her; and, I doubt not, that she and her present husband would be the proper plaintiffs, in Westminster Hall, to compel Colonel Cumming to distribute. I conceive, however, that it is a lawful obligation that she came under, by virtue of her marriage with Mr Forbes, and not qualified, by her marriage contract, to convey whatever should descend to her during the coverture. There is no express article in the contract to that effect, to be sure; but it is clear law, that the marriage supplies it; and this right has descended to her by the law of England giving her *ipso jure* a vested

1812. interest in the succession. Would she not be bound in justice and equity to convey this benefit to the representatives of Culloden; or will any one tell me, that, if any person has granted a direct assignment of all that shall descend to him during the marriage, he would not be bound to implement this by an express conveyance, wherever such a form was requisite. I therefore think there can be little doubt that the law of England would lay her under a complete obligation to transmit to Mr Forbes the benefit of any action for distribution that she could bring against Colonel Cumming; and I am very clear, indeed, that our law would do so. Such is my general view of this case. I cannot see any solid answer to it. But, it is not figurative expressions, but something very precise, founded on principles of international law, or the municipal law of England, that will shake my opinion. In short, my opinion on the whole rests on no subtlety, but on this plain obvious ground, that moveable succession may be taken piecemeal; and that, instead of confirmation, a great variety of equivalents are sufficient to transmit it. When subjects, therefore, belonging to a Scots defunct are to be recovered in England, by virtue of the powers competent of law to English courts of justice, I cannot think I am entitled to shut my eyes to the doctrines and operations by which this recovery is accomplished, and to hold that, merely because they occur in England, they are incapable of operating that transmission of the succession which they would unquestionably accomplish in Scotland, if they occurred here. With us the acquisition of a *jus actionis quocunque titulo*, entitling the nearest of kin to recover personal estate, supersedes confirmation; for it implies that the estate is already vested.

And as the law of England ascribes this *jus actionis* to 1812.
the nearest of kindred; *ipso jure*; the Courts of England
have no occasion whatever for a Scotch confirmation, in
order to produce that vesting effect, that *jus actionis* which
their own law has already imputed to the nearest of kin-
dred. But it is said, that the vesting effect of the law of
England will not operate where the defunct's domicile
was foreign. But why should it not operate? I have
ever understood, that all such doctrines are of universal
application. Years may intervene before the true heir is
ascertained; but when he is ascertained, I presume the
moveable succession will be held to have vested from the
decease of the defunct, in the same manner as would hap-
pen in heritage where *mortuus sedit vivum*. It will be to
me a matter of extreme novelty, if it shall ever be held,
that any of these ordinary rules, by which municipal law
is administered, and human affairs arranged, shall be
made to vacillate and depend, whether they shall operate
or no upon the dictates of a foreign municipal law; or
the proceedings of foreign courts of justice. Nor can I
conceive any occasion for such an irregularity, since per-
sonal estate in England must be recovered and bestowed
by the administration of the law of England, which must
furnish complete means within itself for doing full justice
to claimants, under all manner of rules of succession,
whether prescribed by itself or by any foreign law.

It is said that the case is not quite exhausted; that
there is something else to be decided as to the subjects in
Scotland. I think that a farther inquiry is necessary as
to the commission to Mr Græme, which was followed out
during Culloden's life, or executed in April by a sale of

1812. second question is, in what manner or form are the parties entitled to it, to get the property vested? and it appears to me equally clear, that this must be determined by the law of the place where the property is situated. No form was necessary to vest the right in Mrs Egerton. No letters of administration were necessary at all. I hold that Mrs Egerton, while alive, had a complete right to the whole of these effects. The third question is, what is the right which the marriage created in Mr Forbes during the subsistence of it, with regard to the funds in dispute? This point must be regulated by the law of Scotland; by which it is clear, that if, during the subsistence of the marriage, Mr Forbes had brought an action in the Courts of England, he would have been entitled to say, that, by the law of Scotland, he had a valid legal assignment to all that the wife should acquire, and that having that he would have had a good right to judgment in his favour.

LORD GLENLEE.

I have already said all that I have to say in this case.

LORD ROBERTSON.

I am in the same situation; I remain of the opinion which I formerly expressed.

LORD JUSTICE CLERK.

I concurred in the opinion of the majority of the Court, and after all I have heard, I remain of the same opinion. I think a point which was formerly attended with considerable

stantial right in the succession here must be regulated by 1812.
the law of Scotland, seeing the proprietor had her domicile there. If this were an ordinary question, the distribution would take place in England, according to the rights of parties under the law of Scotland. But I have great difficulty in seeing why we are not to apply that principle to the *jus mariti*. This is a question of succession, to be sure; but take the case of a marriage, where the wife has effects in England. The courts of law there will decide questions as to these effects according to the law of the country where the husband and wife had their domicile. If I am right in this, I am relieved from every inquiry into what the forms are by which the rights of the wife could be transmitted according to the law of England. I have nothing to do with that at all. The whole enquiry is what was the nature and extent of the right acquired by the husband in Scotland. I lay confirmation out of the question altogether. Did Mr Forbes acquire the natural right or civil possession of this property? If he did not, he has as good a right to it as before her marriage. What the effect of the administration is in the law of England I enquire not. I am of opinion that the right remained entire in Mr Forbes.

LORD CRAIGIE.

I was present when the last interlocutor was pronounced, but happened not to have read the papers. However, I approved of the interlocutor, and after all I have heard, I remain of the same opinion. The first question is by what law this moveable succession is to be regulated? and there is no doubt that it must be by the law of Scotland. The

THE CASE *

OF

HIS GRACE WILLIAM, LATE DUKE OF
QUEENSBERRY,

AGAINST

THE RIGHT HON. FRANCIS CHARTERIS,
EARL OF WEMYSS; FRANCIS CHARTERIS, LORD ELCHO, HIS SON;
AND FRANCIS CHARTERIS, ESQ. ELDEST SON OF THE SAID
FRANCIS LORD ELCHO.

1806. In the year 1693, William Lord Douglas, second son of the Duke of Queensberry, married Lady Jane Hay, second daughter of the Earl of Tweeddale, Lord High Chancellor of Scotland. By the contract of marriage, executed upon this occasion between the parties, with consent of their respective fathers and other near relations,

* The author took notes of the pleadings and opinions in this case, at the time when it was heard and decided, and gave them to a professional gentleman. But, having obtained a copy since the preceding sheets were in a great measure thrown off, he has been induced to add the present report, on account of its great importance, though rather out of place in point of date

the Duke of Queensberry and Lord William Douglas re- 1806.
signed the Lordship of Neidpath, lying in the shire of Peebles, and certain other parts of the estate of March, in favour of the heirs of the marriage; and certain other substitutes particularly specified.

By this contract it is, *inter alia*, ' expressly provided
' and declared, and to be provided and contained in the
' said resignation, charter, and seisin, and in all the sub-
' sequent rights to follow hereupon of the said lands and
' estate in time coming: That it shall nowise be leisome
' and lawful to the said Lord William Douglas, and
' the heirs male of his body, nor to the other heirs of
' tailzie, respective above mentioned, nor any of them, to
' sell, alienate, wadset, or dispone, any of the said haill
' lands, lordship, baronies, offices, patronages, and others,
' above rehearsed, as well those to be resigned in favour
' of the said Lord William in fee, as those reserved to be
' disposed by the said Duke of Queensberry in manner
' foresaid, or any part thereof; nor to grant infeftments
' of liferent nor annualrents furth of the same, nor to
' contract debts, or do any other fact or deed whatever,
' whereby the said lands and estate, or any part thereof,
' may be adjudged, apprised, or otherwise evicted from
' them, or any of them; nor by any other manner of way
' whatsoever, to alter or infringe the order and course of
' succession above mentioned. And in case the said Lord
' William Douglas, or any of the other heirs of tailzie
' above specified, shall contravene the same, all such facts
' and deeds shall in themselves be null and void, *ipso facto*,
' without necessity of any declarator; and the person
' contravening, and his heirs, shall forfeit, tyne, and omit,


1806. **all right, title, interest, and benefit, that they can any-
wise acclaim by virtue of this present tailzie, and in-
festments to follow hereupon; and the said lands and
estate shall immediately thereafter descend, appertain,
and belong to the next heir of tailzie immediately fol-
lowing the contravener, without the burden of all such
facts and deeds, in the same way and manner as if the
person, contravener, and his heirs, had never existed, or
had been no member of the present tailzie; and it shall
be lawful and competent to the next heir of tailzie to
serve himself heir to the person immediately preceding
the contravener, without the burden of all such facts
and deeds; or otherwise to establish the rights of the
said lands or estate in his person, by declarator or adju-
dication, or any other manner of way agreeable to the
laws of this kingdom. It is always hereby expressly
provided and declared, that, notwithstanding of the irri-
tant and resolute clauses above mentioned, it shall be
lawful and competent to the heirs of tailzie above spe-
cified, and their foresaids, after the decease of the said
William Duke of Queensberry, to set tacks of the said
lands and estate during their own lifetime, or of the
lifetime of the receiver thereof, the same being al-
ways set without evident diminution of the rental; and
likewise that it shall be lawful and competent to the
said heirs of tailzie, to grant suitable and competent
liferent provisions in favour of their wives, not exceed-
ing 5000 merks, of yearly free rent of the said estate,
and to grant provisions in favour of their children, not
exceeding two years free rent of the same; and with
this provision always, that it shall not be lawful to any
of the said heirs of tailzie to grant new provisions in fa-**

‘ your of their children, until first the former provisions 1806.
 ‘ granted by their predecessors be purged and satisfied,
 ‘ and the said estate freed and disburdened thereof, under
 ‘ the hazard of the like irritancies and certifications above
 ‘ mentioned.’

Under the entail contained in this contract of marriage, the Duke of Queensberry succeeded his father in the year 1751, and made up his titles by special service, as heir of tailzie and provision ; upon which he was infeft.

His Grace was advised, that the entail, of which the material clauses have been quoted, contained no effectual prohibition against granting leases of any endurance ; and in pursuance of this advice, he authorised Mr Crawford Tait, writer to the signet, his commissioner, to grant a lease of the farm of Wakefield, being part of the entailed estate, to Alexander Welsh, for the space of *fifty-seven* years from Whitsunday 1810. Mr Welsh afterwards renounced this lease, and a new one was granted of the same date, with the renunciation of the former ; by which Mr Tait, as commissioner for the Duke, let the farm of Wakefield to Mr Welsh for the space of *ninety-seven* years from Whitsunday 1802, with absolute warrandice. On the other hand, Mr Welsh, upon receipt of the lease, made payment of L 318. 1s. 2d. of fine, or grassum, and became bound for a yearly rent of L.86. 15s. 2d. ; so that in place of a diminution, there was a great increase of the rental.

Doubts being nevertheless entertained of the legality of

1806.  such a lease, under the terms of the entail, the Duke of Queensberry brought a declaratory action before the Court of Session, against the Earl of Wemyss and the other substitute heirs of entail, concluding to have it found and declared, that he was in noways prohibited by the entail from granting leases for ninety-seven years, nor from taking grassums for such leases, they being let without diminution of the rental; and, in particular, that he was in noways prohibited from granting either of the leases in favour of Mr Welsh.

To this action the Earl of Wemyss and Lord Elcho pleaded in defence, that the leases were contrary to, and in violation of, the provisions of the entail; and the action having been heard by Lord Glenlee, as Lord Ordinary, his Lordship appointed the question to be stated in memorials to the Court. Memorials having been prepared and lodged, their Lordships, on account of the great importance of the question, appointed counsel to be heard in their own presence; and the leading arguments made use of upon this occasion will be found in the following speeches for and against the leases.

MR CLERK. (*For the Pursuer.*)

The Duke of Queensberry is the heir in possession of the estate of Neidpath, under a strict entail, which contains no prohibition against granting leases. His Grace is the pursuer of an action of declarator, against the Earl of Wemyss, and the other substitute heirs of entail, which concludes to have it found and declared, that the Duke has right to grant long leases on this estate, particularly

a lease for 97 years ; and the question before your Lordships is, whether, under an entail of this description, the proprietor has a right to grant such a lease, yea or not ; I may, in the mean time, mention, that the lease was granted without diminution of the rental ; on the contrary, there is a small addition to it. 1806.

I need not state to your Lordships, that the Duke of Queensberry holds this estate under an entail, and it is only necessary for me to read the clauses of this entail, which are founded on by the other party as a restraint on the powers of the Duke. These clauses are, ' That it shall not be leisome, ' &c.


This is the clause founded on by the defenders, in this declarator.

In 1801, the Duke granted a lease to Alexander Welsh, for 57 years, at a rent of L. 86. 15s. 2d. and a grassum of L. 201. the rent of L. 86. 15s. 2d. being more than the former rental, so that this lease was granted without diminution of the rental. Afterwards, in 1802, Welsh renounced his lease, and got a new one, upon payment of a grassum of L. 318. 1s. 2d. and at the rent of L. 86. 15s. 2d., so that there was still no diminution of the rental.

The defenders insist, that although there was no diminution of the rental, this lease, being a lease for 97 years, falls within the general prohibitions of the entail. What the pursuer maintains on the other hand is, that this lease is not prohibited by the entail, or by any of the clauses which I have read to your Lordships. In defence

1806. to the action, the defenders state, that the lease is 'contrary to, and in violation of the provisions and prohibitions contained in the contract of marriage and entail, referred to in the summons.' These are the words of the defences; and no doubt your Lordships will think that they require some explanation; for I am sure no man will find in the words which I have read, that a lease for 57 years, or 97 years, or any length of endurance, is contrary to, or in violation of the conditions of the entail. The defence seems to resolve into two questions: 1st, Whether the lease falls under the general prohibitions against selling, annailzieing, and disponing? And, 2dly, which takes it for granted that it does not fall under the general prohibitions, Whether the permission to grant leases for a lifetime, is a prohibition to grant all other leases? The defenders, in the first place, argue the question, whether the lease is against the general prohibitions; and in this view they maintain that it is an alienation. But they say, in the second place, if it were no alienation, at least if it were not struck at by the general prohibitions, that in consequence of the clause, by which the heirs of entail are permitted to grant certain leases, they must be understood to be prohibited from granting any other leases, or at least leases beyond 19 years; for it seems to be somewhat inconsistently admitted, that these may be granted.

It seems to me to be a more distinct arrangement, to consider the question as to the import of the general prohibitions last, and, in the mean time, to assume that the general prohibitions would not be sufficient to prevent the granting of long leases; and I do say that, upon that supposition, I hold it to be perfectly clear, that the sub-

sequent clause can operate nothing in favour of the defen- 1806
ders. I shall again read the clause—"It is always," &c. 
&c. &c.

There is here a permission to the heirs of entail to set tacks during their own lifetimes, or the lifetimes of the receivers, which may be an unnecessary permission; but how it can be turned or twisted into a prohibition of any thing, is to me utterly incomprehensible. I shall even admit, that the granter of this entail may have supposed or believed, that some parts of the entail were inconsistent with the power of letting leases; and I think that is a pretty strong admission. That this entail contains an express permission to let leases, naturally implies that the granter of the entail believed that the other clauses had prohibited it. Supposing, then, that the granter of the entail supposed that, does it follow that leases were thereby prohibited? Suppose an entailer makes an entail containing no resolute clauses nor prohibitions, and that it were established in the clearest manner, that he supposed he was making a strict entail, Would it follow that it was a strict entail? Or, suppose that an entail was made full of permissions, from the one end to the other, to do every thing, Would all these permissions import a prohibition to do any thing whatever? I think it is perfectly clear, that permissions inserted without bounds, multiplied to the end of the chapter, will never infer a prohibition to do any one thing that can be supposed. But this is not the only difficulty attending this part of the defenders' argument; for although it were proved, that the entailer thought he was prohibiting leases, and therefore gave permission to grant

1806. them ; and although it were to be held, in argument and in law, that such a supposition, on the part of an entail-er, should operate as a prohibition, How does it appear, from this entail, to what part of it the entail-er referred, in his supposed prohibition, as prohibiting leases? On what part of the entail does this belief or conjecture of the entail-er rest? Does it follow, that he thought that leases were alienations ; that they were contractions of debt, or alterations of the order of succession? Does he refer to any one prohibition? It cannot be discovered from the entail, whether the entail-er fixed upon any one part of it, more than another, and therefore I apprehend, that the whole of the defenders' argument is perfectly gratuitous, in so far as it assumes, that the entail-er, having prohibited alienations, must have supposed that he was prohibiting leases. Granting even that proposition, it by no means follows, that, in any prohibition against leases existing in his mind, he referred to an alienation of the estate. But the defenders take all this for granted. They suppose not only, that the entail-er supposed that he was prohibiting leases in some part of the entail or other, but further that this supposition of his was grounded upon his having prohibited alienations ; so that the whole of the defenders' argument proceeds upon a conjecture of their own, as to a conjecture of the entail-er.


But even if all that I have now stated were to be given against me, I shall put this question—Suppose that the entail-er, instead of positively prohibiting sales or alienations, had permitted them in part, by a clause of this sort ; or that, omitting altogether a prohibition to sell and dispo- ne, he had authorised, notwithstand-

ing the previous part of the entail, the heirs of entail to sell, 1806. annailzie, and dispone, to the extent of a half of the estate. Would this ever operate as a prohibition to sell the other half? Supposing he had prohibited partial alterations of the order of succession, could this ever operate as a prohibition to sell the other half of it? Supposing he had prohibited partial sales, could this ever operate as a prohibition against granting leases? On the supposition that alienation does not include a lease, it is impossible that your Lordships can hold, that the permission to grant leases of one kind is sufficient to make the word alienation mean what it would not otherways mean. You would rather have recourse to other, and more probable suppositions; you would rather hold that the entailer had been advised by a writer who did not know his business; or that a part of the entail, inserted in the draft, had been omitted in the extending. You will rather suppose some fault in the entail itself, than that an alienation includes a lease. I therefore hold it to be perfectly clear, that unless it can be made out that a prohibition to alienate is also a prohibition to grant leases of all kinds, your Lordships cannot find any prohibition against leasing in this clause, and that the permission cannot operate as a prohibition. Your Lordships cannot supply by implication what is not in the deed itself.

Then I shall proceed to the other point, which is, that, by the general words of the entail, leases of all kinds are prohibited; and that it required the subsequent clause to enable the heirs of entail to grant such leases. In this branch of the defenders' argument, they do not maintain that leases of all sorts are prohibited, they only maintain,


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1806. that the kind of leases which they are pleased to call alienations of the property, fall under the general prohibitions contained in the words ‘ sell, annailzie, and dispone.’ In order to make out this, they undertake to shew, that a long lease is an alienation of the property, and that there being a prohibition against selling, annailzieing, and disponing, there is thereby a prohibition against granting long leases; and by way of confirming this argument, various authorities are produced, to shew that a long lease, or any lease beyond 19 years, is an alienation of the property. Now, in order to answer this argument, I must be permitted to call your Lordships’ attention to the fixed and certain principles, which have long been considered as perfectly established, in the construction of entails. In general, it will be observed, that all restraints on the use of property, are strictly interpreted, as being contrary to natural liberty as well as expediency. They are limitations and restrictions on the freedom of commerce. Every man is presumed to have the unrestrained administration of what belongs to him; and that he should have this power is highly necessary for the public good. Excepting, therefore, in so far as he is restrained in this particular, either by the public law, or by the title under which he holds it, he is entitled to the unlimited exercise and disposal of his property. The great canon of entail law is, that in construing entails, particular attention must be paid to the words made use of; in imposing these fetters upon the free management of property. These are always to be construed according to their plain import, and can never be stretched beyond their clear and obvious meaning. It is unnecessary to illustrate this farther after the case of Duntreath. It was there decided that the

word *heir* did not include the disponent or *institute*, not- 1806.
withstanding the evident intention of the entailer, which 
appeared from various clauses, and indeed from the nature of the transaction itself. It was farther laid down in that case, that the words of an entail are not to be construed by presumptions, or explained by references to other parts of the entail, and that they cannot by construction be made to signify any thing inconsistent with their true and proper meaning. Now, in order to apply this principle to the present case, it is perfectly clear, that if the defenders in their argument have got no farther length than a mere statement, which I own is a probable one, that the granter of this entail supposed that the heirs of entail were not at liberty to grant long leases, they have got no length at all. I don't know that there is any thing in the entail, to shew that the granter had any intention beyond the words of it. I dare say, however, he meant that the heirs of entail were prohibited from granting very long leases; but agreeable to the rule which has been established, the intention of an entailer, let it be ever so clear, is not enough. The entail is not binding, unless the intention be expressed in clear and technical words. Where there is only room for a supposition or a conjecture arising from this, that the entailer would have been extremely inconsistent if he had not intended to restrain the heirs of entail from granting long leases; where your Lordships have only a notion or an idea of your own; where you are obliged to guess at the entailer's meaning; where you have not even evidence of his intention by improper words—by words that have any meaning at all—it is altogether impossible to found a judgment upon such a medium, and consequently hold that this

1806 this entail contains any prohibition against granting leases.

But, it is said by the defenders that the prohibition is contained in the clause against alienating. They do not maintain that all leases are alienations. They admit that leases of 19 years are not alienations; but they hold that leases for a longer term are alienations. Then, upon the defenders' own admission, we are to enquire upon what ground it is that they maintain longer leases than leases for 19 years to be alienations. How comes it that a lease for 20 years is an alienation? The defenders seem to fancy that they have made a very satisfactory answer to this, when they say that a long lease is very prejudicial to the heir of entail, especially if it be granted for a low rent and a grassum. This no doubt is a very prejudicial transaction; but although the defenders could shew, that in loose and popular language it were to be considered as in some respect an alienation, it does not follow, that in proper technical language it is an alienation. Many transactions that heirs of entail have a right to do, are extremely prejudicial to the heirs that are to come after them; and although, in the same vague and popular sense, they may be said to be alienations, yet they are plainly not struck at by the general prohibitions against selling, annailzieing, and disponing. I shall again read the words of the clause. (*Reads the clause.*)

I do not find here any good reason to shew, that a long lease is an alienation. Oh! but, say the defenders, it is an alienation, in so far as it is prejudicial to the heirs. But a very short lease may be more prejudicial to the heirs than

A long lease. Suppose a lease granted for three nineteen 1806.
 years, and that the tenant stipulates a very high rent—
 that in a few years he stipulates an addition to it—and in
 a short time a still farther addition; while to compensate
 completely for the great length of the term of this lease,
 he gives a rise of rent at each prorogation. In the sense
 of the defenders, this lease, though a very long lease, is
 not an alienation of the property, because it is an equal
 transaction, in which the tenant pays a full recompense
 for the benefit of the long term. We may compare this
 lease with a short lease of 19 years for a low rent and a
 very high grassum, which the defenders admit not to be
 an alienation. In this case, I should say, in popular lan-
 guage, that the lease for 19 years at a third or fourth of
 the rent was extremely prejudicial, and therefore an alie-
 nation; and, on the other hand, that the long lease was not
 an alienation, because granted for a full and adequate con-
 sideration, not only to the granter himself, but to all the
 heirs who are to come after him. I apprehend, therefore,
 that there is no ground in principle for the distinction at-
 tempted by the defenders; and as to legal authority they
 seem to have little else to go upon than what are mentioned
 in the printed pleadings.

The first of these is a passage from Craig, as to the
 casualty of recognition; a question of a totally different
 sort from the present. It would appear that Craig's opi-
 nion was, that the vassal, by granting a long lease, sub-
 jected himself to recognition; and, in the question of re-
 cognition, he seems to have thought, that a long lease
 was to be counted with alienations of the property. But
 this can be perfectly well explained, as not bearing on the

1806. question before your Lordships ; for the vassal was bound *bona fide* to do nothing to the prejudice of the superior ; and therefore, as he was bound not to alienate by one sort of title, he was equally bound not to deprive the superior of the benefit of the feu, by a delusive conveyance of another sort, under another name ; and Craig's opinion is, not that a lease is an alienation, but that it is to be held as an alienation in the question of recognition. His words are, ' Quod autem de alienatione diximus, idem doctores putant de longissimi temporis locatione, nam eadem fere videtur causa ingratitude præcipue si ob imaginarium pretium aut mercedem locetur feudum ; nam locatio longi vel longissimi temporis est species quædam alienationis, et sub alienatione continetur ; et fraus fieret legi, nisi et locatio longi vel longissimi temporis simul cum alienatione prohiberetur, licet longum tempus definiatur decennium.' It is perfectly evident what the meaning of this passage is. During the subsistence of the *bona fide* contract, the vassal was to do nothing to the prejudice of the superior, by granting long leases or otherwise ; and a lease for ten years was then a long lease. A long lease was considered as an attempt, on the part of the vassal, to deprive the superior of his right. His right was to have the right of recognition, in case the vassal alienated. Granting a long lease was doing a thing equally prejudicial to the superior, which the vassal had no right to do ; and therefore, in that question, a tack was considered as a species of alienation. But, notwithstanding this, although the view taken of the subject by Craig were as the defenders have wished to represent it, it does not appear that the subsequent writers on our law adopt the same doctrine. Stair does

not say that a long tack is to be considered as of the same nature with an alienation of the feu. And this leads me to take notice of a passage quoted from that author by the defenders, which requires some correction—‘ Subinfeudation, in all cases, is accounted alienation ; and where alienation is prohibited, subinfeudation is understood, and also long location.’ This would go to show, that Stair thought that long location inferred recognition ; but it does not appear, from any authority, that Stair ever wrote this passage ; for it is not to be found in any edition of his works published by himself ; it is only to be found in the latter work edited by another person. I shall read the passage from the edition 1693 : ‘ It is much debated among the feudists, whether by subfeudation recognition be incurred, or whether it be comprehended under alienation ; because in *libris feudorum*, albeit alienation of fees be expressly prohibited, yet in the same place, as Craig observeth, subfeudation is allowed, because by subfeudation, neither the personal prestations betwixt superior and vassal are allowed, seeing the vassal continues vassal, and liable to all these ; neither is the real right and interest of the superior in the fee itself diminished, but he hath the same access thereto as if there had been no subfeudation, yet subfeudation in all cases is accounted alienation : And where alienation is prohibited, subfeudation is understood, and so *emphyteosis*, or feu farm, which is at least a perpetual location.’ And so your Lordships see, there is no authority for stating that long location inferred recognition ; and it will not be said that there is any direct authority, or even indirect authority, for this point being stated by Stair.

1806.

1806. These are all the authorities founded on by the defenders; and on these your Lordships are told, that a long lease is to be held as an alienation. In fact, there is not an authority quoted to your Lordships on the point before you. The rules as to questions betwixt superior and vassal, where not only alienations, but equivalents to alienation, were prohibited—not only alienations technically, but alienations in a popular sense—can have no earthly effect upon this case. There, alienations were of the same nature as alienations on deathbed. The rule of law there, not only goes to a prohibition of sales, or alienations of the estate, but of all other things. A man in this situation cannot even dispose of his moveable property, if he brings a load of debt upon his heirs. Exactly so it is with the superior in the question of recognition, and indeed in all other questions with the superior. But, in an entail, it is *tritissimi juris*, that the fetters, unless expressly and technically laid on, can never be supplied by any equivalents. Your Lordships are not to take equipollents; you are not to take intentions, and far less suppositions as to intentions; you are to take nothing but express words. Such restraints cannot be implied; they cannot be inferred; they are directly contrary to the favourite of the law—the free use that every man is entitled to make of his property. I apprehend, then, that nothing is stated to induce your Lordships to think, that an alienation includes a lease of any description. A lease is merely the hiring out the use of the surface of a subject for a certain time, and for an equivalent in the produce, or in money as the value of the produce. From this very definition, it is impossible that it can be


included in the general prohibitions of this entail. From 1806. the manner in which the words are arranged together, it must be understood, that the words ‘ annailzie’ and ‘ alienate’ are intended to point at an alienation of the property, and not at a location of it.

The definition of alienation, in contradistinction to that of location, is, that alienation makes a change of the property ; it is a transference of the property ; the person alienating has no longer a right to the property ; which is not the effect of a lease. These are the definitions in the law of England, as well as in this country. I don’t doubt but alienation may be made by lease ; an alienation of a lease may be made by lease ; a great deal of the property of England is held by that sort of title ; and when it is said that a man, having the property, can alienate that property by lease, the meaning must be, that he holds the property by lease, and can therefore alienate it by lease ; for the definition of alienation is, that it transfers the property of any thing from one person to another. It is just the same in the law of Scotland, and it must be contradistinguished from lease, which does not transfer the property, either in one view or another. The property of the soil, with all mines, minerals, marl, &c. remain with the landlord : he may work all these upon paying surface-damages ; and, even as to the surface, the tenant is very often under many restrictions. Again, if the lands are overflowed, or covered with sand, no claim lies for rent ; which shows that the property remains with the landlord in this case. The landlord has also a preferable right over the crop for his rent. The crop, in fact, belongs to him to that extent. In the case of extraordinary sterility, the landlord must forego or

1806. abate the rent ; and, until the law was corrected by an act of Parliament, the whole moveables belonging to the tenant might have been seized by the landlord's creditors, to the extent of the rent actually payable. This was the law at the very time when it is said, on the other side, that a lease was held as an alienation. Farther, the landlord has the rights of a freeholder, in virtue of his property in the land. He sits and votes as a Commissioner of Supply ; he is liable in ministers' stipends, repairs to the church, manse, and school of the parish ; and although the tenant is liable to poors' rates, this is in virtue of a special statute. In all these particulars, the rule is just the same, whether the lease be for ten, or nineteen, or two nineteen, or three nineteen, or four nineteen, or any number of years.

I might lay before your Lordships a great many more illustrations of the same kind ; but it appears to me, that from considering the mere definition of the lease, and its effects, it is impossible to hold that, by prohibiting alienations, leases of any length of endurance are prohibited. Let the lease be long or short, it is still a lease. The landlord still retains the property, and it depends upon circumstances, which are not entitled to be considered in this question, whether it is an unfavourable bargain for the landlord, and the heirs that are to come after him, or not. Therefore I submit, that there is no ground for maintaining any of the propositions held by the defenders, either upon the general prohibitions, or the special clause of the entail.

In fact, it has been so found in several cases decided by your Lordships. I shall only take notice of the case of

Leslie against Orme ; and I submit that your Lordships 1806.
cannot decide this case against the Duke of Queensberry, 
without reversing the judgment there. I need not refer
to the case of Kinnaird, &c. ; but I shall state generally
the circumstances of this case.


This was an entail containing all the usual clauses, and,
in particular, positive prohibitions against selling, annail-
zieing, and disposing. Notwithstanding of these prohi-
bitions, Leslie, the proprietor, who was obliged to Orme,
granted him a lease for seventy-six years, at an under rent,
and for a considerable grassum. After this, Orme, with-
out renouncing this lease, accepted of a prorogation of it
from Leslie of three nineteen years, for which a small
grassum was given, I think about L.25. The question
came before the Court ; and they adhered to an interlo-
cutor of Lord Covington, laying down the law in general
terms, and finding such a lease not comprehended within
the prohibitions of the entail. The second lease, or pro-
rogation, was indeed reduced, upon a special ground,
namely, that it was not good against singular successors,
not having been followed by possession. Here we have
nothing to do with it ; because this lease is granted by
the heir of entail, who is alive, and the tenant is either
in possession, or may be in possession.

It has been said on the other side, as to this case, to
show that it does not apply, that the leases were granted
by way of security for money which Orme had advanced in
a lawsuit, by which the estate itself had been secured to a
certain series of heirs, of whom the pursuer was one, and
who might justly, therefore, be considered as barred from

1806. insisting in the challenge. This circumstance, however, had not the smallest weight with the Court. It is not even alluded to in the general interlocutor by which the lease was sustained.

As to Orme's having been at great expence, Orme was never allowed to go into the evidence of his having made any advance for Leslie. This circumstance was never taken into consideration at all. Orme might have paid out L. 9000, or 90,000; it was all one,—Leslie was just his debtor for the money, and upon his death, the heir of entail had nothing to do with it. From the way in which this case is stated by the defenders, it is impossible to see the true relation in which it stands to the present; for they state, that by the tenor of the deed of entail, in place of a prohibition to grant leases, there was a clause specially empowering the heir of entail to grant leases without any limitation in point of time, and even with diminution of the rental. From this statement your Lordships would be led to suppose, that there really was such a clause in this entail; but the fact is that there was none such, and the matter is sufficiently explained by the defenders themselves. In this case there were two entails, the first contained a special prohibition to set tacks with diminution of the rental; but by a subsequent deed, the entailer dispensed with, and annulled this clause, just as if it had never been inserted; for the defenders expressly state, in their information, that a prohibition against granting tacks which had once been inserted, was expressly abrogated and taken away. The case in fact just amounts to this; by the first entail there was a prohibition against granting tacks; and by the second, the prohibition was

recalled, thereby leaving the entail without any clause at 1806.
all prohibiting leases. In short, it is not, as the defenders
have stated it; there was no allowance here to grant tacks
of any sort; on the contrary, there had previously been
a prohibition to grant tacks by the first entail, which, by
the second, was entirely annulled, in the same way as if
the first deed had never contained such a clause, in which
case the second clause would have been altogether unne-
cessary. It was only necessary because the entailer wish-
ed to revoke the first clause, and therefore I apprehend that
nothing can be clearer than that this decision was a gene-
ral one, upon an entail containing general prohibitions
against selling, alienating or disposing; but containing
no particular prohibitions. In this case the Court sus-
tained a lease for seventy six-years. If they sustained a
lease for seventy six-years, it would be difficult to show,
that if the decision is good in the case of any entail, it
should not be good in the particular case now before your
Lordships. No distinction can be made between them.
When a lease comes to be just the same thing with a per-
petuity, it is said that it must be considered as a different
thing from a lease which is something less than a per-
petuity. It must be admitted, in point of fact, that a
ninety-seven years lease is more a perpetuity than a seven-
ty-six years lease; but notwithstanding of this, a lease
for ninety-seven years is not equal to a perpetuity, either
in the abstract, or in any particular view. The diffe-
rence is extremely trifling, if we are to calculate the value
of the annuities, but as a lease for seventy-six years does
not come up to a perpetuity, neither does a lease of nine-
ty-seven years. It requires a lease for a hundred years to
come so near to a perpetuity, as to be held equivalent to

1806.  it. There is a difference, and I believe it is this, that a perpetual annuity is worth twenty years purchase, whereas an annuity for ninety-seven years is worth something less. This is attended to in calculation, and is uniformly deducted. If it is a perpetual annuity of L. 100 a year, it is worth L. 2000; but an annuity of L. 100 a year for ninety-seven years, is worth only L. 1985; coming very near in practice to the value of a perpetuity. But an annuity for ninety-seven years does not come up to it any more than an annuity for seventy-six years; and therefore if the rule is to be applied to this case, I say, that a tack for seventy-six years, in point of principle, is just as much a perpetuity as a tack for ninety-seven years. In short, supposing a distinction between long and short tacks, the one being alienations, and the other not being alienations, it is impossible that your Lordships can strike the line at tacks of ninety-seven years. You must go a little farther; your predecessors did not strike it at seventy-six years, and you cannot do it at ninety-seven. If you are to adopt this argument, and to apply it to a lease for ninety-seven years, it is impossible for you to draw a line at all betwixt tacks which are to be held as alienations, and tacks which, though long, are not to be held as alienations. I should suppose that you would not hold that a lease for twenty years is an alienation, neither can you hold that a lease for seventy-six years is an alienation, after the decision in the case of Orme; and if you cannot hold a lease for seventy-six years to be an alienation, it is equally clear that the line cannot be struck at ninety-seven.


Before concluding, I wish to recal your Lordships' re-

collection to the true state of this case. This is an entail which must be strictly interpreted: in order to produce fetters, we must have some technical expressions; and, therefore, although a lease for one hundred or two hundred years, were, to all practical purposes equivalent to an alienation, yet, if your Lordships have not this technically prohibited, it is impossible for you to extend the terms of the entail. Your Lordships know, that where it is perfectly clear that the entailer intended to prohibit, it is not sufficient. This was found expressly in the case of Hume of Argaty. It is not enough to argue that this was a disposition or alienation and therefore that it was comprehended under the general prohibitions; the thing which was done was not technically prohibited by the entailer; and therefore though an equivalent was done, yet your Lordships cannot interpose your authority to extend the fetters of the entail. 1806.

MR SOLICITOR GENERAL (BLAIR.)


(For the Defenders.)

This question is insisted in by the Duke of Queensberry, and relates to a very important question of law. It is fortunate that his Grace has not only brought the question before this Court, but has done it in the fairest manner. He has not endeavoured to avoid the general question of law by any enumeration of specialties, nor to shelter himself under the protection of a *bona fide* third party. He comes forward *propria persona*, as an heir of entail, holding a large estate subject to certain limitations enumerated in the deed; and he tells your Lordships that, notwithstanding of these limitations he has taken

1806.  it upon him to grant a lease of a considerable farm, to a man of the name of Welsh, for no less a period than ninety-seven years; and he farther admits, that he granted the lease at a rent considerably under the value of the lands; for he states that he received a large grassum, which is now in his pocket; so that he not only grants a lease which is to exclude the substitute heirs for near a century from the natural possession, but he has also contrived to draw the rents, at least part of them, for a century to come. What your Lordships have therefore to consider is, the particular *species facti* in this case; namely, a lease enduring for the space of ninety-seven years, granted in consideration of a large grassum pocketed by the granter of the lease. It is impossible to lay this circumstance out of view at advising this cause; but in arguing it, I shall lay out of question the consideration of the grassum, and shall confine myself to the extraordinary endurance of the lease. I submit that it is a lease such as no heir of entail has a power of granting.

In taking a general view of this case, it is necessary to premise, that with regard to the purpose or object of making a strict entail there can be no sort of doubt; the object of every strict entail is simply this, to secure an estate, not only the property of it, but the beneficial use, possession and administration of it, to a particular family, or a series of heirs, all of whom are to hold it and take the use of it successively, but under this limitation; that they shall not be empowered to encroach upon the possession of the succeeding heir. Both the property and the use of the estate are intended to pass, and be transmitted through the whole course of persons called

by the entailer to the succession. There is one point 1806.
on which I shall not differ from the counsel for the Duke of Queensberry; viz. that entails do not entirely rest upon the act 1685. I remember of once having a different opinion, and stating it to the Court in a question which occurred, as to whether an entail could be executed without the authority of the act 1685. The particular point under consideration was, whether an entail excluded the terce; and after a hearing in presence, the case was decided against me. The argument which I submitted to the Court was, that if there was no authority for entails but the act 1685, there could be no such thing as the exclusion of the terce; the terce does not arise from the act and deed of the party, farther than this, that it results from his taking a wife. It is the act of the law after the marriage, and therefore, under the statute the exclusion of the terce is null and void. But the answer that was made was, that it was a total mistake, to suppose that the validity of entails was founded on the act 1685. They existed long before, and were well known in the common law of Scotland, and the act 1685 only established certain wise regulations in regard to them. In considering the subject of entails before the act 1685, it naturally occurs to us to enquire in what manner they were made at that period. Were it possible, according to the principles of the law, to vest a liferent, or any other right short of property, in the heir, then the thing might have been done; as the heir in this case could exert no right of property; and accordingly this expedient appears to have suggested itself to some of the lawyers of that time; but it was very soon discovered, that, according to the feudal principles of the law of Scotland, this was impossible, but

1806.  cause, by the law they would be held to be feus ; therefore it was necessary to devise some other mode ; and the only way that occurred, was, holding the right of property to be in the heir in possession, to put him under certain limitations as to the use of it. Accordingly, before the act 1685, entails were constructed upon this plan, with all the usual clauses. The act as to the mode of constructing entails made no difference : it allowed every proprietor of land to make them ; but as to the form of clauses and mode of wording them, the act is completely silent ; the form of these prohibitory rules, which are the basis of the entail, was left entirely to the judgment of the party entailer, or of the men of business whom he employed. When a person was to construct a prohibitory clause, there were just two possible ways in which it could have been done, either by inserting a special enumeration of every kind of act, deed or transaction, of whatever nature, that could possibly occur, or be figured by any counsel or conveyancer ;—to construct a complete catalogue of them, and to declare, that it should be unlawful for the heirs of entail to do any one of them. This was plainly impracticable, and therefore the only other mode was to insert in the clause such general terms as in the common law language of Scotland, do include all the acts meant to be prohibited.

Can any man say that he can give a complete enumeration of every deed that can deteriorate the estate ? If any man was ever so foolish, as to think that he could do so, and were to proceed to frame such a list, five minutes would show him that he was wrong ; it would only be necessary to look at his list. An entail of this kind ne-

ver existed—it was never tried—a special enumeration 1806.
 was never given, nor attempted to be given; and, there-
 fore, from necessity, every person who makes an entail,
 adopts the other plan of taking such general expressions
 as he conceives will prohibit, in the construction of the
 law, every thing that may harm the enjoyment of the
 estate, which he means to pass in succession to all the
 heirs of entail. The words used in the prohibitory
 clause of this entail, are general terms, and which one
 should have imagined were the best of all. It was thought,
 that nothing could be better than to adopt the identical
 expressions of the act, sell, alienate, and dispoise. It has
 been made a question, what is the meaning of the word
alienate. What I maintain is, that to alienate, or an-
 nailzie, is not the name of any one deed whatever. I
 never saw a deed called an *alienation* in my life; there
 is no such thing. In all the style books that ever were
 written, there is not one transaction to which the name
 of alienation was ever properly given. It is entirely a
 general term, and may comprehend an infinite number
 of things. The import of a deed in fact is not to be
 gathered from the name, but from the substance. You
 cannot look at the name of the deed, but you must con-
 sider only, whether it has the effect to convey and
 make over any substantial right in the estate; and if so,
 you must reduce it and set it aside accordingly. It has
 been said, that the term *alienation* is only applicable to
 transferences of the property. So far, however, from
 holding this doctrine to be good, I maintain, that there
 may be an effectual alienation in law-language, when
 there is no transference, and that the property may be
 transferred without any substantial alienation at all; for

1806. example, an heir of entail may grant a lease, for 100 or 900 years, at any rent he pleases: or let me suppose, that he lets it at the highest rent he can get; that he accompanies it with another deed, a personal assignment of the rents, in favour of any series of heirs he pleases; in this case, the property remains, but it is good for nothing at all; and in this way the substantial right and enjoyment of the estate is conveyed away to another person; and yet there is here no alienation, because the full right still remains with the proprietor; and the heir of entail, according to the argument on the other side, must be very well satisfied to take the estate under these circumstances.

Again, the property may be alienated without any substantial conveyance at all. Not many years ago, many noblemen and gentlemen in every county in Scotland alienated their estates, because they granted conveyances of the property, and other gentlemen got the property; but what had they? I allude to the political cases from Renfrewshire, in which the law called these rights fictitious estates; and the disponees got nothing but the paper and the parchment. The proprietor lost nothing; he remained proprietor to all intents and purposes. But still there most unquestionably was an alienation. Whether any deed be an alienation or not, depends not upon the form, but upon the sense and the substance of the thing that is done. I don't know any thing that may not be termed an alienation. For instance, a right of servitude may;—a man may grant a perpetual servitude of pasturage to another, over his whole property. In this case the property still remains,

in the eye of the law, in the person of the original proprietor; but, in point of substance, enjoyment and every practical benefit arising from the subject, it belongs to the proprietor of the servitude; and yet this is not an alienation; because the property is only conveyed by way of servitude. What I maintain is, that whether a lease is an alienation or not depends on the nature of the lease. A lease for the common term is no alienation. It is an act of ordinary administration. A lease, such as any man ever granted in the administration of his own estate, that, I do maintain is, in law language, no alienation. This comes to be a matter of authority altogether. The meaning of words is fixed by usage, by the use of lawyers, the authority of acts of Parliament, or other legal transactions. The material point therefore, is, whether, in the language of the acts of Parliament, or of the common law, a lease, granted for an endurance far beyond the period for which ordinary people grant leases, is an alienation or not.

Now, as to this, I hold, that wherever alienation is prohibited, either by the nature of the tenure, or by a deed of limitation, or in any other way, such alienation is understood to comprehend long leases; the party prohibited from granting the one is, *eo ipso*, barred from granting the other. This pervades every branch of the law. It appears in particular from the law that regulate the estates of the Sovereign. In Scotland the Crown's estate was anciently vested successively in the King for the time being, with ample powers of disposal, without any restraint whatever, and this was formerly exercised pretty liberally; at length it was found expedient to entail the proper

1806. **ty on the Crown, and to disable the King from alienating.**

The first of these acts was in the reign of James II. 1455, c. 41, annexing certain lands to the Crown, and declaring them to be unalienable. This act is an entail by the Legislature; and your Lordships will see how this Parliamentary entail has been framed. ‘ And albeit it ‘ happens our Soveraine Lord that now is, or onie of his ‘ successours, Kings of Scotland, till annaly or dispone ‘ upon the lordshippes and castelles annexed to the Crown, ‘ as is before said, that alienation or disposition sall be of ‘ nane availe.’ Here is a prohibitory clause, that the Crown shall not annailzie or dispone. The question then occurs, whether the Crown was at liberty to grant long leases or not; and it is certain that the prohibition was understood to strike at long leases.

Sir George M‘Kenzie, in his observations on this statute, states, ‘ This is the first formal act of annexation; ‘ and though it bear only, that it shall not be lawful to ‘ the King to annailzie any part of his annexed property ‘ in fee, heritage, or frank tenement, without consent of ‘ Parliament, yet this extends to long tacks, for it is not ‘ lawful even to let long tacks of the annexed property; ‘ and if it were, then the design of annexation might ‘ easily be eluded, and the Crown impoverished.’ Your Lordships see, that while he is here talking of the meaning of the word alienate used in the act of Parliament, he tells you very plainly, that, even in the case of the Crown, a prohibition to alienate was held as a prohibition against long leases; that is, leases beyond the ordinary term.

I may also refer to the act of annexation passed after 1806. the rebellion in 1745; although there was nothing in that act levelled against the power of the Crown to grant leases, yet the word alienate being used, it was held that this would extend to leases; and, therefore, a clause was introduced into the act, empowering the commissioners to grant leases of a certain description; which shows that the act of annexation, as then understood, would have barred leases without such clause.

There is another case of alienation which I think a very strong one, namely, the case of alienation prohibited by the nature of the feudal tenure, which took place with regard to ward-holdings. The vassal was prohibited from alienating the feu, in order that the superior might not be deprived of a sufficiency of land for the maintenance of a vassal. This sufficiency was fixed to be one-half. Supposing then, that a vassal grants a long lease, such as a lease for ninety-seven years, which, if sustained, would defeat the right of the superior as well as an alienation; could this be defended by any reference to the mere form of the conveyance. In the feudal sense, it is laid down by Craig, that a ten years lease is a long lease; and that long leases were alienations to the effect of creating a forfeiture against the vassal by the act of the law. The nature of the tenure created, in this case, the strongest possible entail; and it was held that a long lease was to be considered as an alienation, even to the effect of subjecting the vassal to a forfeiture of a penal nature.

With this doctrine of Craig, Lord Stair also coincides;

1806. but it is said, that the words quoted by the defenders from Lord Stair are not in the edition of his works first published. But we know that the written additions which he had made to the original work, subsequent to its first publication, were put into the hands of Mr Gordon and Sir William Pulteney. These gentlemen had the whole observations and manuscript notes of the author, from which, along with the first work, they were to compile what they considered to be a good edition; and your Lordships have the authority of the editor, that this was a good edition. It is not merely the opinion of Sir William Pulteney that is here in question. It is his fidelity as an editor. He is here as a witness, telling your Lordships that he has inserted the words upon the authority of manuscripts.

Another case of alienation prohibited in these very words, is the case of alienations on death-bed. The word alienation is used to express such conveyances in all the old authorities, in the statutes of William the Lion, and in the books of *Regiam Majestatem*, in which the expressions are uniformly prohibitions *alienare terras*. Notwithstanding of this, according to the argument now maintained, a lease granted on death-bed must be held not to be an alienation. This point, however, was tried in the case of *Christison v. Kerr*; and the decision gives exactly the doctrine that weighed with the Court. ‘ A
 • ‘ tack for three nineteen years of the granter’s whole
 ‘ estate, done upon death-bed, though alleged to be for
 ‘ an adequate rent, was reduced; it being pled, that
 ‘ though a tack for a moderate endurance, granted upon
 ‘ death-bed, may subsist, as being an act of ordinary ad-

of administration, a tack for three nineteen years is a species of alienation which cannot be granted upon death-bed: December 1783, *Christison v. Kerr*. Here the Court declared, that a lease granted on death-bed for three nineteen years was an alienation; and yet we are told, that a lease for five nineteen years is not an alienation.

Another case of alienation prohibited is found in the act 1621, disabling persons indebted from alienating their estates, to the prejudice of their creditors. And what is particularly to be noticed in this statute is, that not a word is said as to granting leases: there is not a single syllable from the one end of the act to the other, by which a debtor is disabled from granting leases; and yet the greatest of our lawyers lays it down as clear law, that although leases are not nominatim prohibited, they are comprehended under the general expression of alienating. Suppose a question were to arise upon the construction of the act 1696, as to this point. If a man, within sixty days of his bankruptcy, were to grant a lease of his estate to any one of his creditors, could your Lordships listen to any argument, that he was not barred by the words of the statute from granting leases, as they only related to alienations?

There is another instance that seems to bear very strongly upon this question, namely, where a prohibition to alienate is created by legal diligence, that is, in the case of inhibition. Lord Stair gives a style of an inhibition, warning the debtor, that he nowise put away any of his goods or effects; that he make no private alienation, &c. Not a word is said as to his granting leases. I shall just put the case,

1806. that a man served with an inhibition were the very next day to grant a lease for 900 years, at a small rent or a great rent, or any rent; is it possible to maintain, that this would be held to be valid, or that there was no prohibition against it because the inhibition only prohibited public or private alienations? I am sure that no such argument could possibly be maintained. The authorities I have alluded to, maintain, that granting of long leases is alienation. It is no doubt true, that this may be said to be an indefinite expression; and it is so. But the only line which your Lordships can draw, is just what was adopted in the case of Christison,—that if it is a lease far beyond the ordinary endurance of leases, and such as no man is in the practice of granting in the common administration of his own affairs, then it is to be held an alienation. It is very possible, that, even adopting this principle, cases may occur where it is extremely difficult to draw the line. Great or small, long or short, are relative terms, and therefore indefinite. If we look only at the extremes on either side, the question can be attended with no difficulty; but to fix the intermediate point where greatness ends and smallness begins, is a matter of the greatest nicety. The same difficulties attend all general terms, and they seem to be inherent in the nature of language; young and old run into one another by imperceptible gradations. We are at a loss to tell what is called old or young; it is impossible for us to determine when a man ceases to be young, and becomes old. But, when we apply ourselves to any particular man, there is no difficulty at all. Suppose a man of the age of this lease, there would be no difficulty in the world, in saying that he is an old man; and just the same ob-

reservation applies to this lease itself for 97 years. Your 1806. Lordships can have no doubt that it comes within the description of a long lease ; that it falls under the meaning of the word *alienation*, and must therefore be set aside. I don't know any stronger proof with regard to the meaning of the word *alienation* in law language, than is to be found in a clause made use of in this very entail. It was plainly understood that the word *alienate*, in the general prohibitions, extended to letting leases ; because, after these prohibitions, there follows an exception, allowing the heirs to let leases, either for the lifetime of the granter or the receiver. What clearer evidence can be desired, that this gentleman understood the general clause as comprehending leases, when your Lordships find that, immediately after it, the heirs of entail are expressly permitted to grant leases.

A great deal was said as to the meaning of the words *long lease*, when the act 1685 was passed. I have looked at an abstract of the entails that were made at this period, and for some years after, and I find, that every one of these entails goes to confirm what I am now maintaining. There is a great part of them that rest entirely upon the general prohibitions. They prohibit selling, alienating, and disposing, without saying one word more. There is another class of them, I believe about six or seven, which are just exactly in the style of this very entail. They contain general prohibitions, and when they speak of lease, it comes in by way of exception from the general prohibitions. An entail from Dallas was referred to, where there is an express clause prohibiting tacks of a certain endurance ; but it is plain that this clause was absolutely ne-

1806. cessary. The lease there prohibited is any lease except for the grantor's life ; of consequence, that is a prohibition which could not have been created by the general words, because the entailor does not mean to allow leases even of two years endurance. His object is to make a prohibition against setting any lease whatever for a longer time than the life of the grantor. It was his meaning that the heirs of entail should not have the power of granting leases at all for any number of years certain. This required an express clause ; and upon looking at the other entails of the same kind, every one of them in the same way prohibit leases of all kinds, except for the life of the grantor. No lease whatever for a fixed number of years is allowed. Such a prohibition could only be done by an express clause ; and, for a long period, this is the only case where any express prohibition against leases is inserted. I see one clause in the entail of Craigievar, prohibiting leases for five years, which sufficiently knows the understanding of the country as to long leases ; but where it was meant to prohibit leases beyond the common term, nothing is expressly stated as to leases at all. The writer of the entail relies entirely upon the general expressions. In later times, it has no doubt been more common to insert express clauses, which, without all question, are more explicit.

The authorities chiefly relied upon, on the other side, consisted almost entirely of the decisions of this Court in the case of Duntreath, &c. by which it was established, that in construing entails, there is so far to be a strict interpretation, that the fetters of the entail cannot be extended by implication, and that the Court cannot sup-

ply omissions. I have not the smallest difficulty in acquiescing in all these decisions; but, in the case before your Lordships, I am not desiring you to adopt any of that latitude of construction so much deprecated on the other side. I am founding upon an express prohibition, contained in general words. I say that the word *alienate* contains every thing which comes under it in a legal sense; a general word is just as good as an enumeration of particulars, and I defy the gentlemen to point out any one case where it was held that a general word is not to be understood in the same sense in an entail as in any other deed or writing. 1806


In the case of *Duntreath*, it was found that a prohibition laid upon the *heirs of entail* does not affect the *institute*; and for this reason, that they are not laid upon him in legal language. An *heir* and an *institute* are two different persons altogether. An heir is a different person from an institute; and if the gentlemen can show me, that where the word *heir* is used it does not extend to all kinds of heirs, but only to a particular kind, then their case will be somewhat more tenable than it is at present. But I believe it will be difficult to find out any such case. The prohibitions are laws directed against heirs; but suppose there is an heiress, and that she contravenes, the question then occurs, whether she is comprehended under the general prohibitions. According to the argument we have heard, the word *heir* would not comprehend her; but I believe no such idea was ever entertained, for every thing is not required to be particularized and expressed. It is sufficient if general words are used, and if we only

1806. ask your Lordships to construe them according to their
fair, legitimate, and strict sense.

The case of Leslie v. Orme has been mentioned. This was a case of a very special nature, including a variety of particulars; the interlocutor in the case is five quarto pages long. The leases themselves stood in a situation extremely peculiar. Orme had paid a consideration for them to the whole heirs of entail; every one of them were his debtors; he had rescued the estate from the rapacity of a set of German Counts, who had contrived to get hold of it; and, in fact, he had rendered the estate effectual to the whole series of heirs; and I see, that so far as I can judge from the notes I took at the time, for I was counsel in the cause, one half of the opinions of the Judges is occupied in enumerating the peculiar situation in which these leases were granted; the consideration that was given for them; and its having been in *rem versum* of the whole members of the tailzie. The offer to pay Mr Orme, was under the condition, that all the settlements of accounts which had taken place between him and Mr Leslie, were to be given up, and thrown aside; and farther, your Lordships see there was a particular clause in the entail, containing a power to grant leases. There was originally a prohibition, but it was afterwards recalled by a special clause. After all, even supposing that these specialties had not existed in this case, the lease was for seventy-six years; whereas in the present it is for ninety-seven. I submit that this is not a decision in point, and that it cannot be held as fixing the law; and, accordingly, in a subsequent case, I mean the case of Sir William Elliot,

the matter was fully considered by your Lordships, and 1806,
 you declared, that a long lease was an alienation, and in sound
 construction must be held as such. It is true the
 lease was for an ordinary endurance; but upon the point
 of law, that a lease in such and such terms was an aliena-
 tion, the Court had not the smallest doubt. Besides these
 standard authorities, to which we are always accustomed
 to appeal, we heard yesterday of the opinions of lawyers,
 some of them dead, and others still alive. I have always
 held that, in giving opinions, it is the duty of counsel to look
 to the decisions of your Lordships, and form their opinions
 accordingly; but now it seems it is their opinions that are
 to guide your judgments, and not your judgments their
 opinions. Pitfour's opinion allowed leases of the common
 endurance; but beyond that it did not go. A lease for
 five nineteen years could never have been granted, except
 by a person who wanted a covert mode of alienating the
 estate, and putting a large sum into his pocket to the preju-
 dice of the heirs of entail. I never yet saw an opinion, nor
 ever heard of one given, and I am sure none could be
 given by any one now at the bar, that would go to sup-
 port this lease. If such a lease has been granted, it must
 have been upon some other authority than the opinion of
 any practising lawyer at this bar, or the general under-
 standing of the country.

In the very summons, the pursuer tells your Lordships,
 that he had granted this lease, but that doubts had arisen
 as to its validity; and no wonder that doubts should arise.
 In fact, it seems to have been made by way of experi-
 ment; and Welsh was to run the risk of its being effec-
 tual. It was said, that this was a proof of the under-


1806.  standing of the country, that an heir of entail was under no restriction against granting leases for 97 years. Now, I do maintain, that no such idea ever was, or ever will be entertained by any person. If such a power is supposed to be inherent in heirs of entail, by men of business, unless there is a particular clause prohibiting them; how does it come to pass, that all the entailed estates of this country are not covered by leases of this endurance. Shall I be told, that the heirs of entail at the present day have no inclination to go so far as they could go, or as their men of business tell them they can go?—No such thing. The fair presumption is, that every heir of entail feels himself to be fettered, (no man likes to be fettered), and every heir likes his own interest better than the interest of the heirs of entail that are to come after him; but the fact is, that such leases do not exist. I do not speak of the present Duke of Queensberry. I do not found upon his having received this large estate free from any burden, and enjoyed it for such an unprecedented period. I speak of common heirs of entail, none of whom ever yet dreamed of granting leases like the present. How comes it then, that what has escaped every other person for centuries, has at last occurred to the Duke of Queensberry, and that he has discovered what lay concealed from every other person, although in the highest degree favourable for their own interest? Your Lordships, it is hoped, will have no difficulty in assoilzieing the defenders.

After the pleadings were concluded, the Court proceeded to advise the case; upon which occasion the following opinions were delivered.

LORD HERMAND.

1906.

If this question were to be decided upon grounds of expediency, it is plain, that such a decision should be given as would contribute most to the encouragement of agriculture. Which of the doctrines maintained by the parties in this case, may have that effect, I cannot say; but this I can say, that I am not entitled to form any opinion upon considerations of expediency, unless there be law to support them. I am not entitled to abandon the general principle that property may be used in every lawful way, unless restrictions be legally and technically expressed. This is a principle of public expediency; and what is of more importance in my mind, it is an established principle of law, beyond which it is not my duty, and certainly it never is my inclination to go. Viewing the question in this light, and holding that the Duke of Queensberry is entitled to exercise every lawful act of property in relation to this estate, unless in so far as he is bound by the restrictions of the entail; the only point in dispute comes to be the nature of those restrictions. There is here a prohibition to sell, alienate, and dispoise, which terms all resolve into one general prohibition against alienation. Now the argument of the defenders is, that the general term alienation comprehends leases; and thence they infer that leases are prohibited by the entail. But I have always understood, and indeed have been taught by many decisions of your Lordships, to consider it as law, that in the construction of entails, no recourse is to be had to inference, and that the intention of the entailer, and, of course, the effect of the entail, is to be confined within the obvious and strict meaning of the words used. The ex-

1806.  pressions of this entail would comprehend wadsets ; these have a much stronger resemblance to alienation than leases ; and yet if there were no prohibition against contracting debt, it never surely could be contended that a general prohibition against alienation could import a restriction upon wadsets, or could bar the heir in possession from effectually granting such deeds. But it is said, farther, that long leases are held by Craig to be similar to alienations, and to be prohibited where alienation is prohibited. Craig was no doubt a very great general feudal lawyer ; but he was by no means a good antiquary, and his authority in the law of Scotland does not stand very high ; but his authority, whatever it is, does not bear upon this question. His words are, ‘ Quod autem doctores,’ &c. (Reads the passage.)

This refers entirely to the question of recognition in the relation between superior and vassal ; and Craig’s opinion seems to be, that deeds similar to long location, were contrary to the *bona fides* of the contract. But I am extremely doubtful how far this doctrine can be applied to the case of entails. As to the passage from Stair, there is great reason to believe that it is an interpolation. There is no mention of long location, which comes in very awkwardly here in the two preceding editions of the work, that appeared in his own time, and indeed the context excludes the supposition. ‘ Subinfeudation,’ &c. (Reads the passage).

These are the words as to which a doubt has been entertained. The real opinion of the author is discovered from another passage. (Reads the passage.)

1806.

These words have a very different import; and, in my opinion, deprive one of the parties of any argument founded upon the authority of Stair. A great deal depends in the decision of this case, upon the kind of interpretation which your Lordships are to bestow upon this entail, and the acts of Parliament that have been founded on. Some lawyers have thought proper to bestow a large and liberal interpretation upon the annexing acts; and Sir G. Mackenzie in particular, makes use of that interpretation from the supposed expediency of retaining the annexed lands. The same construction has been extended to the bankrupt acts, from the favour due to creditors, and the necessity of discouraging fraud. Neither of these reasons, however, exist here. We are to construe the terms of this deed according to their strict legal meaning; and I have no difficulty in holding, in point of law, that a lease of any endurance is essentially different from an alienation. Under the longest possible lease, many valuable rights remain. The tenant has only the use of the mere surface of the grounds; the proprietor has right to his rents, to the woods, the minerals, the fishings, the political influence, and the continual prospect of resumption, upon the issue of the term. As to what constitutes a long lease, it is said, that sometimes nineteen years, and sometimes more, are sufficient for this purpose; but the only difference between long and short leases, consists in the term of endurance. The rights of the parties continue the same in both, and whether long or short; distinguish them essentially from alienations. And indeed upon a contrary doctrine, there must be the solecism of a double property in the same subject. For if a lease is an alienation, the tenant is proprietor, and the landlord

1606. is also proprietor. It was urged, however, that if alienation does not include long leases, there is no power given by the act 1685, by which an entailer could effectually prevent their being granted for any term of endurance. But it appears to me that an admirable answer can be made to this observation; for surely the word alienate, in the act of Parliament, cannot be employed to sanction some leases, and to prohibit others. Under the act of Parliament, it would certainly be competent for the granter of an entail to lay fetters upon the institute, because he is an heir of entail, and yet, in the entail itself, the word heir will not comprehend the institute. In the same way, it is certainly competent for an entailer to prohibit long leases; but the word alienation cannot, in my opinion, extend to such deeds. Now, how is this to be explained? It is to be explained by the nature of that interpretation which your Lordships are bound to give to entails. If the words had been clear and uniform, the case would have been different; but being as they are, doubtful and general, strict rules of construction must necessarily be applied to them. In some entails, heirs of entail are restricted from letting leases, and in others, leases are not mentioned at all. We have heard something about opinions. I believe many opinions have been given in favour of long leases, where there has been nothing but the general word alienation, and other opinions have been given against them; but, for my own part, I do not agree with either the one side or the other. My opinion lies in the middle, betwixt the two. It is not in my power to conceive that a sale and a lease are the same, or that an alienation can have taken place, where the subject is only hired; and, therefore, if a fair rent is taken, I see no reason of reduc-

tion, upon the mere ground of length of time; but if 1806. part of the rent be taken as a grassum, to that extent I hold that there is a sale, and, therefore, in so far I am of opinion, that the transaction is reducible. As to the permission, it is not in my power from the permission of one sort of lease to infer the prohibition of another. It only presumes, that the entailer had supposed that he had already prohibited all leases different from those that he permitted. I can't hold that the permission of labouring leases is equal to the prohibition of all other leases. In short, it appears to me that there is little or nothing in the alleged specialty; and as to the general point, I am clear for decerning in terms of the libel.

LORD CRAIG.

My opinion is different from what has just now been delivered; and I shall therefore state to your Lordships, in as few words as I can, the view which I have taken of this case. It has been the practice for a considerable time past, for courts of law to interpret entails strictly and rigorously, and where there is any doubt to presume against the entail. It has also been established that where there is a deficiency or incongruity in one part of an entail, this is not to be supplied or corrected by reference to another. These have been the general doctrines of the courts of law, in relation to entails, as they were settled in the case of Duntreath and others, ever since which time these views have been uniformly adopted. The last case was the case of Tillicoultry, where all the former decisions were confirmed and held as good authorities. But, in general, the views which were sanction-

1806. ed by these decisions, do not appear to me to bear very forcibly upon this case, which, in my opinion, must be decided upon other grounds. If this case were to be decided one way, then every heir of entail has an unlimited power of granting leases for any period, at any rent, and upon whatever terms he thinks proper, and he may forever deprive the whole series of substitute heirs of all benefit, from the increasing value of the estate. For if the proprietor of an entailed estate is entitled to let that estate at the present rental, for any period he pleases, the consequence will be, that wherever, from improvements in agriculture, or any other cause, the value of land has been augmented, the heir in possession will grant a perpetual lease at the present rental, and pocket all the additional value of the lands in the shape of a grassum, and thus prevent any advantage from ever accruing to any substitute heir, however remote from the possession of the estate. He may incumber the estate with a long lease in favour of any person he pleases, and thus bestow the whole substantial advantage of the property in favour of an entire stranger. From the nature of this case, as well as from the entail, it appears to me, that where it is palpable, that the lease is granted to prevent the heirs of entail from deriving any advantage from the lands, the sustaining of such a lease would destroy the very purpose of entails, as it would always be in the power of the heir in possession to grant the estate in the form of a long lease, to a person more favoured than the substitute heir. This is doing something in fraud of the entail, and I have no doubt that the entailer intended that the lands should be tied up. It is not merely the rents that are entailed, it is the estate itself; and although it was found in the

case of Tillicoultry and others, that unless where there 1806.
are express words prohibiting a certain act from being
done, the Court cannot interfere; yet that does not ap-
ply to the present case, for here there is a tack granted
for an uncommon length of time, in defraud of the en-
tail; and it appears to me, that it falls under the express
words of the deeds; that is, in law language, it is an
alienation to a certain extent. It does appear to me, that
the meaning attached by lawyers, about the time of
passing the act 1685, to the word *alienation*, does compre-
hend a lease of this kind, though it is not a total aliena-
tion, but only a partial one. There is a great distinction
betwixt this case and the case of Duntreath and others,
because the question there was, whether one clause in the
entail should be employed to illustrate or explain another,
by implication, or one part of the deed supported by re-
ference to another; and the House of Lords found that
such could not be done; but in the present case it is quite
different. This is not a case where your Lordships are
called upon to do any thing of the kind. The question is,
whether, under the general clauses of this entail prohi-
biting alienations, this lease is comprehended, under cover
of which there is a palpable and evident intention to alie-
nate the estate. The great difficulty is, what leases are
to be considered as alienations. There is no doubt that
the proprietor of an entailed estate can grant leases, but
as he cannot grant all leases, the question comes to be,
what leases can he grant. It is clear that this is a lease
for a length of time much beyond the common period.
It is a lease for ninety-seven years. It defeats the pur-
pose of the entail altogether. With regard to the in-
creasing value of the estate, I lay some stress upon the

1806. circumstance of this lease being an anticipation, and upon its being granted before the period of the former expired. This shews a plain intention to defraud the entail to a certain extent. There is another clause permitting leases for the lifetime of the granter and receiver. I do think that the giving of this allowance clearly goes upon the idea, that tacks beyond that period ought not to be granted by any heir of entail, and were understood by the granter of this deed to be included under the previous prohibition. Upon the whole, I am clear for sustaining the defences.


LORD JUSTICE CLERK (HOPK.)

I have formed a very clear opinion for assoilzieing the defenders from this action. In the view which I have taken of this case, my opinion is not in the smallest degree hampered by any of the decisions that have been pronounced by this Court, in relation to a strict construction of entails. I am not attempting to extend by implication, a clause binding upon one description of heirs to another, or one species of prohibition to a different species. Neither am I resorting to one part of this entail for an explanation of any other part. The question here is simply what, at the date of this entail, and of the act 1685, was the legal meaning of the word annailzie; and I am clear that, without referring to any other word, but taking the word annailzie itself as it stands in this entail, and all other deeds at the time, it applied to leases of long duration; and it will appear to your Lordships, if you attend to the nature of property, on one hand, and of leases on the other, that it must be so.

What is the meaning of property but to have the use and enjoyment of the subject? For without the use of property, the abstract right is of little or no account. A tack is just a more compendious mode of enjoying the benefit of an estate. There cannot be a doubt that every man would naturally like to have his own estate in his own management; and in this way he would make more of it, if it were convenient for him to cultivate the lands himself; but this is impracticable, either where a person has a large track of land, or where he is led to turn his attention to some other profession; and therefore tacks have been devised, whereby the enjoyment is given to some other person for a proper consideration; and in this way the proprietor has the use of the property in the way most beneficial for himself, and perfectly consistent with any other avocations in which he may be occupied. From these considerations it follows, that every cause by which the proprietor is prevented from enjoying the full right and use of his property, is an alienation. Suppose a tack granted without any diminution of the rental, nay with a current increase of the money rent, or that the whole is fixed in grain, which does not vary in its value, and the tack granted for ninety-seven years, but that at the same time the proprietor alienates a certain proportion of the rent to another person, payable as it comes in, Could he do this under a clause prohibiting alienations of the estate? Most certainly not: he could not touch one of those rents, because these constitute the use of the property. But is there any difference betwixt this and letting leases for ninety-seven years, and pocketing large grassums, which, in 1806.

1806. point of fact, are nothing more than the accumulated increase of rent, which would be paid for the lands during the whole years of the lease. The use of the subject is perfectly known in the law of Scotland to be different from the right of property. A theft may be committed as to the use of the subject, and therefore I think it clear, that the word alienation applies to every act by which the use of the property is taken from the proprietor. Leases of a certain length must be allowed, even under the strictest prohibition to alienate, and in this view, I have no difficulty as to what leases are to be allowed, and what are to be prohibited. I will take the decision of the country at large upon this question, not of any particular part, but the average of the country practice. It was once thought necessary to grant leases for a long endurance to encourage agriculture; but this was a very mistaken notion, as I believe lands held under such leases will be found to be the worst cultivated in the kingdom. But at that time perhaps the proprietor might have acted *bona fide*, as to what was reckoned the best way of improving lands, though they cannot do so at the present day. Long leases are not now customary.


If your Lordships are not to interpret the word 'annailzie' according to the understanding of the law and the Legislature at the time, there are many other acts of Parliament that will be altogether useless. One instance occurs to me just now, namely, the acts against killing *kipper salmon*. Kipper salmon are not now understood to mean living salmon, but signify salmon cured after a certain way. Formerly, however, the word applied only to

foul salmon, which were prohibited to be killed; but it 1806.
 became a practice for those who contravened the statutes, 
 to cure the salmon in the way alluded to, in order to
 conceal their bad qualities; and as it is now the practice
 to prepare all salmon in this way, the word 'kipper' ap-
 plies exclusively to the method of cure, although for-
 merly it denoted the quality of the fish. In interpreting
 this act of Parliament, however, your Lordships must
 take along with you the understanding of the country at
 the time, as to the terms made use of; and you must do
 so, to apply a sound construction to every act of Parlia-
 ment. The opinion which I have now delivered, is very
 much fortified by several clauses in this deed. The en-
 tail itself proves, that the word 'annailzie' applies to
 leases; for, in effect, it just says, that the general prohi-
 bitions shall be no bar to granting certain leases. What
 was the use of this clause, if the general words had not
 implied, and necessarily inferred, a prohibition against
 letting leases for a longer duration. Suppose an entail,
 after the strictest clauses prohibiting alienations of the
 estate, contractions of debt, and alienations of the order
 of succession, in general terms, contains a clause of this
 kind, that, notwithstanding thereof, it shall be lawful to
 grant jointures to widows, and provisions to children, to
 a certain extent; Would not this be a prohibition against
 granting them to a greater extent? This clause is al-
 ways expressed in the form of a permission, and it has
 always been considered, that it did necessarily infer,
 against the heir in possession, a prohibition to grant join-
 tures or provisions to a greater extent than was permitted.
 This lease is of such a duration, that it is altogether

1806. without the range of common business;—it exceeds all ordinary acts of administration; and therefore I am clear that it ought to be cut down.

LORD ARMADALE.

This entail, I observe, contains a clause declaring that it shall be in the power of the substitute heir of entail to grant leases to endure for the lifetime of the granter, or the receiver. This is a permission to grant leases to a certain extent; and certainly it very clearly indicates, that it was the intention of the entailer that there should be a prohibition to a greater extent. But I hold that we cannot from this clause infer such prohibition. There must be technical words, clearly and legally expressed, to constitute such prohibition. We cannot infer a prohibition to do a certain act, from a permission to do a part of it. Suppose a deed of entail contains no prohibition against contracting debt, but a permission to contract debt to the extent of L.500; this certainly would never imply a prohibition to contract debt to any extent whatever. There must be a legal and technical prohibition, expressed in clear and unequivocal terms, before it is possible for us to tie up the hands of the proprietor. In the same way, suppose the case of a deed of entail containing no prohibition to alienate, but a permission to alienate to the extent of 50 or 60 acres; Could it possibly be argued, that this would infer a prohibition to sell to a greater extent? It is very true, that it is a sufficient indication of the proprietor's intention, and of his understanding of the law at the time. But this cannot supply the absence of a prohibition in

legal and technical terms; and, therefore, the clause I 1806.
have quoted does not at all enter into my consideration 
as a specialty in this case. So it is necessary to inquire
whether the act done by the pursuer falls under the gene-
ral prohibitions of the entail.

If the question were put to me, whether a lease grant-
ed according to the ordinary mode of administering a
land estate, at a rent equal to the present current value
of the lands, is to be considered as an alienation, I
would have no difficulty in answering, that it is not an
alienation. A lease granted according to the usual prac-
tice of landed proprietors, is the necessary and essential
way in which lands must be managed; but where leases
are granted for an immense length of time, a period far far
exceeding the lifetime of the granter and the receiver, and
still more where the rent is indirect and accompanied with
a grassum, I take it that, in sound law, it is in fact an
alienation of the property. A lease of this description
has at all times been considered in law as an alienation;
and I think in effect and substance it is so, where the
heirs of the granter are for an immense length of time
entirely divested of the natural possession.

Upon a view of all the authorities, it appears from the
earliest stages of our law, that long location has been held
to be alienation, and to be prohibited where alienation is
prohibited. Such are the opinions of Craig, Stair, Bank-
ton, Erskine, and other authorities. Craig talks of the
case of recognition; other lawyers are talking of other
cases; but all of them, whatever may be the subject

1806. immediately under discussion, lay it down expressly, **that** long location is alienation. As to the period and duration of the lease, there will be different ideas and opinions at different times, according as the views of mankind may vary in different stages of society. But it has been uniformly held, that whatever period be considered to amount to a long lease, long leases are alienations. Such are leases granted by his Majesty, or by churchmen, which were looked upon in the same light. Supposing a lease to come in competition with an inhibition, or a conveyance in that form, challenged under the act 1682; your Lordships would certainly never listen to any observations tending to shew that these were not alienations. On the contrary, you would principally consider the substantial nature and effect of the conveyances; and if their true and genuine import were to alienate the estate, you would hold them to be alienations, and to be reducible accordingly. And, indeed, I see that this point has been already decided by your Lordships in a question upon the law of death-bed, regarding a lease of three nineteen years; although there was no fraud, no elusory rent, and the heir was found entitled to challenge it upon no other ground, than that long location was held to be alienation.

The law itself makes an essential distinction betwixt leases of moderate endurance, granted by proprietors fairly in administration of their estates, and longer leases, both in regard to the lessor and the lessee. In the one, the lessee has power to assign, but in the other he has no such power; so that upon every view, I think there are

grounds for a sound distinction betwixt leases granted for a short and ordinary period, and leases for an extraordinary and immoderate period. This was the understanding of the law previous to the act 1685, and I think it was so considered at the time ; and, in fact, it has always been considered in that light. To say that feus carry right to metals and minerals, woods, fishings, and so on, and that a lease does not ; what is this to the purpose ? May not a lease do so ? I see nothing to prevent it ; and I think the distinction entirely without foundation. A lease is a substantial alienation, and deprives the proprietor and his heirs, not only of the use of the subject, but of every prospect of attaining possession.

This being the understanding of the law at the time of the act 1685, I think it would be most extraordinary indeed, if, while the Legislature meant to make a general regulation with regard to the powers of proprietors of land, location should be considered as alienation to any other effect, but should not be so considered by the Legislature at passing this act. It was then thought, that long leases were ineffectual against singular successors. What is the act 1685 ? It does not enumerate all the different species of alienations, but, in broad and comprehensive terms, it allows proprietors to grant tailzies, containing limitations as to selling, alienating, and disposing the property. It does not point out the particular forms in which such conveyances are to be executed, but it permits prohibitions to be inserted as to selling, alienating, and disposing ; and, in the same extensive and general terms, it enables proprietors to prohibit contractions

1806. of debt, without specifying whether by heritable bond, wadset, adjudication, or otherwise, although it is impossible that a doubt can exist, that such special transactions are forbidden by the general prohibitions against contracting of debt.

The chief difficulty in the case, though I confess I cannot think it so, is, that there may be a difference in the minds of men as to the line of distinction betwixt reasonable leases and those which are to be considered as long location. In the days of Craig, it seems, leases for ten years were considered as alienations; but this must vary according to the peculiar notions of the times. It must vibrate betwixt the two extremes, according to the peculiar character of each state of society. It depends upon the opinions of men, and must be judged of by circumstances, and what, upon the whole result, is considered as a rational step in the administration of a land estate, at any given period. But I am confident that, at no one time, can long leases be considered in any other light than as alienations; and therefore I am for assailing the defenders.

LORD BALMUTO.

Leases may certainly be granted by heirs of entail, but they are partial alienations. The terms of this entail are very comprehensive. Can any thing be stronger than the permissive clause, to show that leases were prohibited by the former clause? In my opinion, there can be no dispute that there is here an alienation of the property?

Does not the pursuer tell your Lordships the rent of the estate; and does he not sell this rent, by taking a grassum? This was clearly an alienation to the prejudice of the heirs of entail. I am for sustaining the defences. 1806.

LORD WOODHOUSELEE:

I shall not detain your Lordships long in delivering my opinion, because it agrees with the sentiments already expressed. I think that a man, after enjoying an estate during the period of his own life, ought not to take upon himself to exercise a dominion over his successors for all time to come. It is a ruinous policy that land should be out of commerce. An heir of entail is bound by all the prohibitions and fetters under which he takes the estate, but in every other respect is just a free proprietor. He is entitled to the free use and administration of his property enjoyed by other proprietors: Where leases are not expressly debarred, he may grant leases, such as are truly leases in every particular. No man ever gives a lease which amounts to a perpetuity; no free proprietor ever does that by means of a lease. He lets a lease for ten or nineteen years, or such other term as is usual, although this is, in my opinion, a natural and ordinary exercise of property, such as any unencumbered proprietor is entitled to do; but no lease beyond that period can be said to be granted in the usual and free use of property. In this case, a lease is let for a period far exceeding the ordinary duration of leases. I think it is, to all intents and purposes, a deed of alienation; and I think it must fall under the general prohibitions of this entail. A lease for this period is, to all intents and purposes, an alienation of the

1806. property ; therefore, I have no hesitation in sustaining the defences.

LORD NEWTON.

I must observe, that the Duke of Queensberry is entitled to scarce any degree of credit for the way in which he has brought forward the question ; but, I apprehend, the merits of the case lie within a nut-shell. It is clear that, in the language of the law of Scotland, the granting of a long lease was always considered as a species of alienation. Sir George Mackenzie lays it down in the most express terms, and he wrote at the very time the act was passed. There is some difficulty as to what shall be considered as a long lease ; but we are relieved from this by the entail itself, which permits leases for a certain time to be granted. This is just the same thing as if the entailor had said, that he meant to prohibit all leases but these.

LORD MEADOWBANK.

I think the case so perfectly clear, that I cannot have a doubt upon the subject.

LORD BANNATYNE.

Wherever a lease is a cover to an alienation, your Lordships cannot support it, if you give a fair and just interpretation to the act of Parliament. This appears to me to be the nature of the present lease, and therefore I am clear for sustaining the defences.

LORD PRESIDENT.

(SIR ILAY CAMPBELL.)

My opinion is just that of all your Lordships. All of us know, 1st, That a lease may be granted by an heir of entail, which is not an alienation; and, *secondly*, That a lease may be granted, which is really, substantially, and truly an alienation. Now, it is unnecessary for me to bring under your Lordships' view, examples of the two extremes, because they must be obvious: For leases for one year, or two years, or in Craig's time for ten years, or in the present day for nineteen years, are not alienations. But, on the other hand, will any man say with candour, or is it possible for a lawyer to maintain, that a lease for 1000, or 10,000 years, for something much below the present rent, is not an alienation. It is quite impossible that the contrary can be maintained. Suppose that it is granted for the present current rent for 1000 years, depriving the heirs of entail, for that long period of time, of all the profit and enjoyment of the estate; reserving out of it no more rent, perhaps, than a mere quit rent, to be enjoyed by the heirs of entail. I cannot say that this is not an alienation, though the difficulty is to fix the precise line; and this is not only a difficulty now, but it has always been a difficulty, and the only difficulty. All of your Lordships have been asked the question—I am sure I have been asked a hundred times, sometimes in the shape of memorials and queries—not what length of time a man may grant a lease, but what time you would advise him to grant it. He wishes to go to the utmost length of his right. The only answer that I could ever make to this,

1806. was an answer which I shall not mention to your Lordships at present, because by and by I will make a better ; but I had no difficulty in saying, I will tell you what length of lease the Court of Session will sustain : I will not advise you to go beyond the practice of the country where you are. There is a practice to go a greater length—two, or perhaps three nineteen years ; and possibly the Court may sustain it ; but I would not advise you, as a friend, to grant such leases. You may judge for yourself ; but, as a lawyer, I will not advise you to do it. And I will ask gentlemen in my eye, whether they ever said to their clients that they could grant a lease for ninety-nine years. Mr Ferguson's opinion goes no farther than what I have just stated. There may have been leases let for four or five nineteen years, and if that be the practice of the country, you may go that length ; otherwise not.

But I have to call your Lordships' attention to a change of the law respecting entails, at the period when this entail was made, and when entails of an ancient date were made ;—I mean, in the last century. It is a remarkable circumstance, that, for the most part, these deeds are entirely silent as to the power of leasing, although they contain a clause, in the way of an exception, permitting certain leases ; and I can put no other construction on it than this, that it was never known that leases of a longer duration were granted, and that the entailers understood, that, under the general prohibitions, leases of a very long duration were included. I see that some lawyers have held, that an heir of entail may grant a lease for the period of his own interest in the estate, if


the tenant choose to depend on that; but it was never understood that, beyond this period, an heir of entail could grant leases, so as his successor might be excluded from his right to enjoy the estate. I think this was the idea of a very noted man at the time,—I mean Sir John Nisbet; for he fixed upon the period of his own life and interest in the estate as the period for which he might grant leases. Other entails say nothing about it, which I ascribe to some of the causes that I have already mentioned. There has been a change of ideas and opinions, as well as of manners and customs. In Craig's time, a lease for ten years was an alienation; but I cannot think that this can be an alienation now. In the general understanding of the country, a nineteen years lease has been long considered as an act of ordinary administration.

But this is not all; for I beg your Lordships' attention to the act 10th Geo. III. c. 51, for encouraging the improvement of lands. This act contains certain clauses relative to letting leases on entailed estates, where the heir of entail is under prohibitions; and what is the description given of what the Legislature then supposed were the leases that an heir of entail might grant? I see that nineteen years is the lease which an heir of entail may grant. It is the ordinary term of a lease. The enacting words of this statute are general; thirty-one years is the utmost length for which a lease can be granted; but then the tenant must be taken bound to enclose the ground; so that, under this limitation, the power may be exercised of granting leases, which shall not be considered as alienations. The utmost limit is thirty-one years. Why is it limited to thirty-one years? because the Legislature


1806. considered, that to grant leases beyond that time, was acting in defraud and in defiance of the provisions and fetters of the entail.

There was formerly a difficulty that I could never answer, but the answer to it now, is just precisely to adopt this act of Parliament; and I could now, were it necessary or proper, tell any friend of mine, you may grant a lease for nineteen years, and take a grassum, but you cannot go beyond thirty-one years; and if you go that length, you must insert a clause obliging the tenant to enclose, in terms of this act. If the noble Duke therefore will restrict this lease to thirty-one years, and insert such clause, I shall be for sustaining it. To do otherwise would be to destroy the whole law of entails. I am not asking for any thing here, but a strict interpretation of the entail. I am not in the smallest degree tied up or restricted by any decision of your Lordships on this subject. There is a very strong specialty in this case; for the entailer has in effect said, I tie you up from annuizing, and I tie you up from granting long leases, but what I mean by long leases, is leases for a longer duration than the lifetime of the granter and the receiver. Under this act of the 10th of the King, I think the Duke of Queensberry may go to the length of nineteen years without any restriction.

The Court then pronounced an interlocutor, sustaining the defences; or, in other words, finding, that the Duke of Queensberry had no right to grant a lease for ninety-seven years.

To this judgment the Court adhered, after advising a 1806.
reclaiming petition for his Grace, with answers for the 
defenders.

Counsel for the Duke—Erskine, Clerk, Murray. For
the Defenders—Solicitor-General (Blair,) Forbes, Thom-
son ; Agents, Crawford Tait, and John Anderson, W. S.



PART II.

TRIALS AND PROCEEDINGS

BEFORE THE

HIGH COURT OF JUSTICIARY.

THE TRIAL
OF
ENSIGN HUGH MAXWELL,
OF THE LANARKSHIRE MILITIA,
FOR
THE MURDER OF CHARLES COTTIER,
PRISONER OF WAR AT GREENLAW.

15th June 1807.

PRESENT,

**LORDS JUSTICE CLERK,
DUNSINNAN,
CRAIG,**

**CULLEN;
ARMADALE.
MEADOWBANK.**

THE indictment stated, that upon the evening of Wednesday 1807. the 7th of January 1807, the pannel being then commanding officer of the military guard stationed at the house of Greenlaw, in the parish of Glencorse and county of Edinburgh, then used as a place of confinement for prisoners of war, was informed by Alexander Wardrope, serjeant in the regiment of Lanarkshire militia, that he heard some noise in one of the rooms of the said house, where certain of the said prisoners were then shut up, whereupon the pannel immediately went to the outside of the window of the room from whence the noise was said to proceed, and called out to the persons within it to extinguish a light which

1807. he alleged was there ; and that, immediately thereafter, he ordered John Gow, a private in the said regiment, who was then posted as a sentinel upon the said house, and under his command, to come towards the place where he was standing, and then did feloniously order and command the said John Gow to fire his musket, loaded with a lead ball, into the room, knowing that a number of the prisoners of war were there confined ; which order he again and repeatedly gave, until the said John Gow did point his musket towards the room, and pulled the trigger, which missed fire ; whereupon the pannel did again wickedly and feloniously order the said John Gow to fire into the room ; and the said John Gow, as commanded by the pannel, did fire his musket, loaded with a lead ball, through the window of the room, whereby Charles Cottier, one of the prisoners, who was then lying there in a hammock, was mortally wounded, the ball having penetrated his left hip, and lodged somewhere near the right side of his belly ; of which wound, inflicted in consequence of the pannel's orders, the said Charles Cottier died, after languishing till the afternoon of the following day ; whereby it was concluded, that the pannel was guilty of the crime of murder, actor, or art and part, and therefore ought to be punished with the pains of law.

The indictment being read, the pannel pleaded *Not Guilty* ; and his counsel, Mr FRANCIS JEFFREY, then addressed the Court as follows.

MY LORD JUSTICE CLERK,

On the part of the prisoner at the bar, we are to state no objections to the relevancy ; but it has been thought

proper, that, before proceeding to the evidence, he should 1807.
state by his counsel to the Court, and in the hearing of
those who are to compose his Jury, the grounds of the
plea, upon the faith of which he has now said that he is
not guilty.


The tenor of this defence consists in a denial of the charge, and in the allegation, that if this prisoner was actually killed, it was in consequence of orders which he was justified in giving, so that he must stand acquitted by the circumstances in which he was placed. In a case so serious and so unfortunate, your Lordships are to expect no admissions on this side of the bar. Accordingly, to the tenor of that general denial which has been given to the libel, I now adhere; and whatever statement I think proper to make to the Court and the Jury, I make hypothetically, supposing the facts asserted to be established by legal proof. I have called this case an unfortunate one; and whatever the issue of it may be, the epithet is already justified by the existence of this trial. For, surely, other than unfortunate the circumstances cannot be deemed, which have brought a British officer to trial, in consequence of the death of a prisoner of war under his charge at the time. Unfortunate certainly as these circumstances are to the country at large, they are particularly so to the individual at the bar. When an event of this kind happens, various prejudices are apt to be excited; and from these, though opposite in their nature, it does appear to me that the case of the pannel receives equal detriment. On the one hand, among the unworthy and calumnious, an impression goes abroad, that where a prisoner of war perishes by the hands of those who are appointed to guard

PART II.

TRIALS AND PROCEEDINGS

BEFORE THE

HIGH COURT OF JUSTICIARY.

1807. within the call of the house. No more than thirty-six  men were reserved for the actual guard; a number which evidently appears to have been very insufficient for securing prisoners of such a number, in a house of that description. The prisoners were all prisoners of war: most of them had been crews of privateers, and therefore somewhat more disorderly than persons employed in more regular branches of service. Accordingly, previous to the arrival of my client, various endeavours had been made to escape, some of which had proved successful; and a short time before, an attempt had been made to effect the escape of the whole body, by undermining the walls of the house.

These men were extremely turbulent, and it required violent coercion at all times to keep them within the bounds of their duty. In this situation, it was felt to be the duty of those who had the management, to issue very strict orders as to the economy of the house; and particularly in winter, when the nights were long, it became necessary that, at an early hour, they should be prevented from making any attempts to effect their escape. This could not be done merely by stationing guards on the prisoners, but only by adopting certain regulations that could be enforced by those without the prison, and the breach of which could be matter of observation to them. Accordingly, all the lights were required to be put out by nine o'clock; and as every contravention of this order must be interpreted into some attempt on the part of the prisoners to make their escape, it was of necessity inferred, that if they were stirring after that hour, it was for some improper purpose.

In these circumstances, my client, newly arrived upon this important station, informed of the recent attempts to escape, himself aware of the turbulent disposition of the prisoners, felt it to be his duty to relax nothing. Accordingly, he was uniformly remarkable, as well for the temper and moderation, as for the firmness and vigilance with which his orders were enforced. On the night of this fatal accident, within less than ten days after his arrival, he was the officer on guard. He had gone his rounds, and inspected the prison after dark, and given his orders for extinguishing the lights. The order was obeyed, as he understood; and, having passed the whole day alone, he retired to the guard-room, where he was employed reading. He had not been long in this situation, when a serjeant of the regiment, of the name of Wardrope, came to the guard-room, and reported that there was an alarming noise in one of the largest rooms in the prison; that it was so loud, and had continued so long, that he felt it to be his duty to give him notice. He immediately repaired to the place, and being convinced by his senses that there was a noise, and that lights were burning in spite of the order, he, with a loud voice, ordered them to desist from the noise, and to extinguish the lights. This order was entirely and resolutely disobeyed. He repeated it twice or thrice; and to enforce it, he knocked three times with his hand and sword upon the window. No cessation of the noise or of the lights took place, but both continued; and the noise was of such a kind, as to show that a great number of persons were engaged in some considerable work of labour; and as it could not continue unless for some unlawful and desperate purpose, he then felt it to be his duty to say that he would

1807. fire. This had no effect. He then turned to the sentinel, and commanded him to fire. The sentinel did fire, and a man was wounded, who afterwards died in consequence of the wound.

These are the facts which we understand will come out in evidence upon this trial; and I think they warrant us in concluding, that, if they are established, no doubt can remain that the pannel must be acquitted.

His defence is therefore twofold : *first*, and mainly, that he himself was a soldier, an officer on whom a most delicate and important duty was imposed, which he was bound to discharge at his own peril; and, *secondly*, that this duty related to prisoners of war assembled in a large body, who had been long under the command of a military force, and were perfectly apprised of those orders to which they refused obedience.

It is necessary to state, that a soldier is justified in performing acts by which the safety of individuals may be risked, which those other individuals could not lawfully venture to execute. A soldier is entitled, in assertion of his duty, and in maintenance of his post, to disregard those rules of law that regulate the ordinary transactions of other men. In support of this doctrine, I need not read authorities, as I trust it will be stated by your Lordship to the Jury. I lay it down in general, that a soldier is bound to obey the orders he has received. Where they contain no specific directions, he is bound to exercise his own discretion, so as to secure their general object; and if, upon an investigation, it shall turn out that there was

any occasion for doing what was done, he shall stand justified to the law. Nay, if his conduct was such as might have occurred to a man of common sense in similar circumstances, he must be justified, although it may appear, in the sequel, that a different mode of proceeding might have been more expedient. In illustration of this, I may mention the case of violence used in the suppression of tumult and riot. By the order of a magistrate, or even without such order, a military body may be entitled to expose the lives of tumultuous persons to hazard in such circumstances, although it might afterwards appear that it was not absolutely necessary. The military has often been called upon to act, in cases where people at a distance have been of opinion that such interference was precipitate; yet was it ever heard of, that if, in fact, there were appearances of turbulence, disobedience to repeated orders to disperse, indications of a riotous disposition clearly manifested, and if a magistrate, in the sound exercise of his discretion, had ordered them to fire, and death had ensued, he should answer with his life for the consequences? No such thing ever happened. It is sufficient for his justification, that there were circumstances of great danger, such as would have alarmed a person of ordinary fortitude. 1807.

I may also allude to the case of a sentinel firing, when he challenges a person who does not answer; in which case, it is not only lawful for him, but is his bounden duty to do so. Suppose he does fire, and it afterwards appears that he has killed an infirm individual, whom he could have mastered with his left arm, or that it was a drunkard, or a woman who might have been ignorant of the

1807. necessity of making any answer: Will that convert into murder the legal and the allowable act which he has done under the impression of his duty, and the necessity of the case? Although it were proved that no actual attempt to escape took place, still, unless it be disproved that circumstances did not exist which could have justified that belief; unless it be proved that no lights were burning, and that no noise was heard, my client is entitled to a verdict of acquittal.

But if these pleas are good, even in the common case of persons assembled in a riotous manner on the street, how much more force must they have in the case of prisoners of war, held in custody by a scanty guard. I do not mean to depart from the statement of which I had the honour to set out as to the sacredness of prisoners of war, and the sanctity and strictness with which their wrongs ought to be inquired into. But where they outnumber sixfold those who have the charge of them, it is necessary to attend to the situation of those persons who are bound to perform their duty at their peril. On the other hand, the prisoners must be presumed to have had a constant and perpetual purpose of escape. They were in a state of continual hostility, from night to morning, with those who were appointed to guard them; and seeing it distinctly explained, that the slightest degree of noise, or appearance of light, would be interpreted into an intention to escape, of which they well knew the consequences, they had themselves to blame if they were guilty of either. Besides, as they are persons who are firmly united together, who wish to take advantage of all the circumstances in which they are placed, and have no

sort of regard for the comfort or safety of those who guard them, they cannot be deterred from any attempts to escape, by the least concern for the dangers in which, if successful, they will involve the persons to whom that duty is committed. They are in opposition to them at all points, and must therefore be guarded with the most severe and unremitting vigilance. It ought also to be remembered, that they had indicated not only a disposition to escape, but a violent degree of aggression against the persons who guarded them; and it will be proved that they were repeatedly fired upon before the arrival of my client at Greenlaw. Men thus fearless by their profession, and desperate from the circumstances in which they are placed, were not only formidable from their peculiar habits, but they were bound, from the same consideration, to learn, and to observe more accurately, the orders that were given them. The greater part of them had been there for years, and all of them for many months. They were thoroughly acquainted with the rules. No excuse therefore can be founded upon their being unskilful persons, or ignorant of what would follow upon their disobedience of orders. They were persons who knew all that from their profession and habits. It had been fully interpreted and explained to them, and enforced every hour that it became necessary. It was a military order to be enforced like all other military orders, that the noise should cease, and the lights be extinguished, at nine o'clock; and that any disobedience should be held as a fair indication of an attempt to escape, which would justify the most violent measures against them. Under all these circumstances it is clear, that my client acted consistently with his duty. The smallness of his de- 1807.

1807. tachment,—the separation of the quarters in which the prisoners were placed—the great number assembled into the room—the impossibility of setting a guard into every room—and the full consciousness of the prisoners that they were to be fired upon if they disobeyed the order,—left him no room to doubt, or at least entitled him to presume, that they were making that attempt to escape which he was bound in duty to prevent. He was chosen to command the guard, for qualities which, in the judgment of his superior officer, fitted him for that office; and I trust it will appear, that he has not disappointed the expectations that were entertained of him. The point of law is, whether circumstances have not been made out that justified the apprehension of some tumult or attempt to escape. If, on the other hand, it shall be made out that there was nothing but what a single word could have quieted, then indeed my client will stand in a perilous situation, and all I have stated will be but an aggravation of his offence.

MR SOLICITOR GENERAL (BOYLER)

MY LORD JUSTICE CLERK,

The counsel for the prisoner has not offered any objection to the relevancy of the indictment; and his own good sense and legal knowledge must have taught him, that none such could be made. For this reason it is perhaps unnecessary for me to make any observations. The present is a very serious charge against the prisoner, and I rise chiefly for the purpose of stating, that it is the wish of those who conduct this prosecution, as far as is consistent with their public duty, to refrain from stating any thing which may tend to weaken the force of the pannel's defence. Wish-

ing him to have the benefit of every thing that has been 1807.
now urged, I have no hesitation in saying that it will af-
ford me pleasure if it be substantiated to the fullest ex-
tent; at the same time that I feel it my duty to state,
that, according to the information that has been laid be-
fore me, I entertain a very different opinion of the case,
from the account of it that has been just given. The
whole matter, however, depends upon the evidence, and
in place of reasoning upon an assumed state of the fact,
I think it better that your Lordships should follow the
ordinary course, by pronouncing the interlocutor of rele-
vancy, and remitting the case to the consideration of a
Jury.

The Court then pronounced an interlocutor of rele-
vancy, and the following jurymen were impannelled and
sworn.

James Thomson, writer to the signet.

James White, merchant in Edinburgh.

Robert Dickson, plumber there.

Charles Watson, upholsterer there.

Houstoun Rigg Brown, coachmaker there.

James Walker, wine merchant there.

William Couper, upholsterer there.

Thomas Ovenstein, cabinetmaker there.

John Biggar, builder there.

Thomas Blackwood, merchant there.

Adam Freer, merchant there.

George Thomson, merchant in Leith.

William Grinly, broker there.

John Wilson, merchant there.

James Inglis, merchant there.

1807. The public prosecutor, in order to establish the charge, called the following witnesses.

John Gow, private in the Stirlingshire militia, stated, That he belonged to the detachment under the command of Ensign Maxwell, which did duty at Greenlaw in the month of January 1807. On the 7th of that month, about nine o'clock at night, he was posted as a sentinel on the inside of the palisade with which the prison is surrounded; and in about half an hour after, he was accosted by serjeant Wardrop, then doing duty as serjeant of the guard, who asked him if he heard any noise. He said he heard nothing but the noise of the prisoners walking in the room. The serjeant immediately went away, and returned in a little with Ensign Maxwell, the pannel, who came and listened at the window, which is about the height of a man's middle, said he heard a noise. He desired the serjeant to listen, who said he heard a noise. The pannel then steping back said he saw a light, gave two taps on the window, and called out to them in a loud voice, and in English, to put out the light, otherwise he would fire upon them. He then ordered the witness to fire in if they did not put out the light; to which order the witness, not supposing at first that the pannel meant him to fire, paid no regard. He had not at that time seen any light himself. The order was then repeated by the pannel, commanding him to advance and fire, upon which, being distant about six yards from the window, he advanced within two yards of it, and, coming to the position of *present*, he drew the trigger, but the piece snapped. The pannel ordered him to make ready again, and he did make ready. The pannel then, in a loud voice,

which could have been heard within the house, ordered 1807. him to fire straight through the window upon them, if they did not put out the lights; upon which he fired straight through the window, and immediately heard a grumbling, or moaning, among the prisoners. When he received the order he heard a noise, but nothing more than the noise of the prisoners' feet. He had heard the same noise before serjeant Wardrope came up to him, and called his attention to it; but he did not think it necessary to report it to the serjeant. He would not have thought it necessary to fire if he had not been ordered by the pannel, in consequence of which alone he fired. The orders which he received from the corporal of the guard, when he was posted as a sentinel that night, were, that if the lights were not put out he should fire upon them. Nine o'clock was the hour at which the lights were to be put out, when the drum went round the house as a signal for that purpose. If they were not then put out, he was ordered to call out to the prisoners to put them out, and that if the lights were not extinguished he would fire upon them. If this was not obeyed, he was to call and threaten again; and if not obeyed, to fire without further notice. He was also directed to take care that none of the prisoners should come out under ground, nor put their hands out at the window. He was to fire if they did not withdraw their hands at the second order, all which were verbal orders. The pannel did not desire him to raise his piece, but to fire straight through the window. Upon his cross-examination the witness stated, that as soon as he fired he saw the light through the hole made by the bullet, but he had not seen it before. The sentry box was not opposite the window, and when he was ordered to ad-

1807.. vance, the advance was to come up to the window. He gave no opinion at the time whether the noise was sufficient to justify firing. He heard no answer from within when the pannel called to the prisoners. There were broken panes in the window before the shot. His reason for paying no regard to the first order was, that he did not see any occasion for it.

Alexander Wardrope, serjeant in the Lanarkshire militia, stated, That he was on guard at Greenlaw on the evening of the 7th January 1807; and that, about half past nine, as he was going his rounds, Hamilton, the sentinel in the outside of the palisade, called out to him that there was a great noise in the prison. He immediately came up, being in the outside of the palisade, and about ten yards distant from the window of the prison, and heard a great noise of speaking, laughing, and working at something as if it had been upon the walls. He immediately called out to Gow, the other sentinel, and then went to Ensign Maxwell, the pannel, who came along with him to the window, of which the shutters were in the inside, and saw a light. The prisoners were making a tumultuous noise, as if they had been fighting, but he heard no noise of picks, axes, or any instruments. The pannel then called to them twice very loud to put out the light. It continued, as well as the noise, upon which the pannel ordered Gow, the sentinel who was walking in the outside, to fire. He presented and pulled the trigger, but the piece missed fire. The pannel then repeated his order, upon which the sentinel fired, and the ball went through the window. The noise immediately ceased, and a man was heard crying out. The witness and the pannel then went to the wicket, where they met the jailor,


who had been alarmed by the shot, and they three went into the room together. They then saw the light, which was a candle burning, and a man wounded in a hammock, the second from the window, and in the high tier. The wound was in the back of the right thigh. The man's clothes were off, as he had gone to bed, but a number of the prisoners had their clothes on. The pannel said he was sorry for what had happened, but as it was his orders, he could not help it now. The wounded man was carried to the hospital and died next day. There were three sentinels within the palisades, which were locked and the key kept at the guard-house at the outside; and two sentinels in the passages of the jail. The witness stated, that he saw written orders for the guard in the officers' room at Greenlaw. A copy was produced in his own handwriting, which was left in the guard-room for the benefit of all the guard. When they first arrived at Greenlaw, they received, from the detachment which they relieved, a verbal order, which was given to every guard and sentinel; that at nine o'clock the lights were to be put out within the prison; and that, if this was not done at the second call, they were to fire upon the prisoners. He never received this order personally from the officer of the guard, but it was communicated to his corporal by the corporal of the old detachment. He heard Captain Rowan of the Lanarkshire militia, who commanded the detachment in January 1807, give out an order, that before firing, which he said it was a pity to do, merely upon seeing the light, they should get the jailor to go round and see what was the reason of its being kept in. This order was given to Lieutenant Ferguson, but not communicated to the men. The witness stated, that or- 1807.

1807. ders are in use to be communicated from one corporal to another. The new sentinel got his orders from the old, and the officer afterwards went round to enquire what the orders were. He saw the light at the time of the accident, but thought there was something hung up in the inside to prevent its being seen, though he saw nothing on the walls when he went in, nor any appearance of towels having been employed. The prisoners were often warned, and all knew that they would be fired upon if they did not put out the lights. The other noise, besides talking and laughing, seemed to be a noise of feet, which continued after the pannel called to them to be quiet, so that there was no silence until the piece was fired. The prisoners had been fired on before, as he saw marks which he was told by the jailor were marks of firing.

Henry Hamilton, private in the Lanarkshire militia, stated, That at nine o'clock on the evening of the 7th of January 1807, he was on guard at Greenlaw, on the outside of the palisades, and was accosted by serjeant Wardrope, then going his rounds, who came up and said he heard a noise, and asked if he heard it. He answered that he did; and it appeared to him to be the prisoners walking up and down the room. The witness was here asked if he suspected that any thing uncommon was going on; to which he answered, that he did not suspect any thing of the kind. Serjeant Wardrope then went away, and returned with the pannel, who opened the gate of the palisades, and went with the serjeant to the window of the prison. The witness looked towards the window, and saw no light; but the pannel listened, and saying that he saw light, ordered it to be put out twice; and

then commanded the sentinel to fire. The sentinel did not 1807.
seem to obey the first order, upon which the pannel asked
him if he heard what he said. He answered that he did;
and the pannel then ordered him to make ready and fire
right through the window upon the prisoners. The sen-
tinel accordingly did so, but he thinks the piece snapped;
and the order being repeated, the sentinel fired again,
upon which he heard a cry from the prison, as if a man
was wounded. The noise did not continue after the pan-
nel called to put out the lights. The prisoners are in the
practice of wearing wooden clogs, or shoes; and the
noise appeared to him to proceed from their walking
with these upon the floor. When serjeant Wardrope
came up to the witness, he was ten or twelve yards from
the window; and he had heard the noise before he saw
the serjeant. He had been sentinel there before; and it
did not appear to him to be any other noise than what he
was in the daily practice of hearing. He heard the pan-
nel say that, if they did not put out the lights, he would
order them to be fired upon. There was an order, that
they should make no noise nor burn lights after nine.
The drum had gone round that night for publishing these
orders. He would have thought it necessary to report
the noise to the serjeant.

Duncan M'Millan, private in the Stirlingshire militia,
stated, That about nine o'clock on the evening of Wednes-
day the 7th of January 1807, he was posted as a sentinel
in one of the passages in the inside of the prison, and at
the door of the room into which, about half past nine, a
shot was fired. He heard no uncommon noise in the
room that night, nor any noise except that of the prison-

1807.  ers walking through the room ; though if there had been any uncommon noise he must have heard it, as he was standing at the door. When the shot was fired, the prisoners called out to him to go for the serjeant of the guard ; and he passed the word to the other sentinels. The serjeant and the pannel then came, and in a few minutes the jailor, who opened the door. The witness did not go in along with them. The pannel and the serjeant called for a light, which he gave them from the passage ; and he then saw the man brought out of the room. Upon his cross-examination, he stated, that he was sure the door was opened before the pannel called for the light.

William Lockhart, private in the Stirlingshire militia, stated, that, at nine o'clock on the evening of Wednesday the 7th of January 1807, he was stationed as a sentinel in a passage of the house at Greenlaw, about fifteen yard from the door of the room, into which a shot was fired about half an hour afterwards. Previous to this he heard no uncommon noise ; though if there had been any such, he thinks he would have heard it. Upon his cross-examination, he stated, that the door of the room was a strong thick door with iron bolts.

Peter Cameron, turnkey at Greenlaw, stated, that he was there in January 1807. On the evening of Wednesday the 7th of that month, about sunset, he shut up the prisoners, who lie in different rooms, and in hammocks placed in tiers one above another. The drum was beat at nine o'clock, as a signal to put out the lights ; and it is his duty to see that all was right about the prison. At nine

o'clock in the evening of the 7th, he went round by the palisades, found every thing quiet, and then went to the lodge, where he usually stays all night, and put on a fire; he then went to his own house for a short time, and upon returning to the lodge, and finding that the sentinel had given an alarm, that there had been firing into the prison, he took a light from the passage, and went along with the pannel and serjeant Wardrope into the room, where they found a man wounded, who, he was told, was Charles Cottier. His clothes were off, and he was in the highest tier of hammocks. When the witness went into the room he thought he saw a light, but could not say positively. They took the wounded man to the hospital, where they dressed his wound, and took every care of him; but he died next day at three o'clock. The room in which the prisoners were confined is about twenty or thirty feet square, contains thirty-one separate hammocks, in which the prisoners slept. Cottier was in the second hammock from the window, in the tier opposite to it. There was a lamp on the outside of the palisades, directly opposite to the window, and the shutters were closed in the inside. Some panes of the window were broke; but there was no cloth, nor rug, nor any thing hung up before it. When he looked in the prison he saw the window quite safe; though he did not look at it when he went in. There was nothing that looked like an attempt to break the prison. The prisoners were all in bed, except two who were working about their hammocks. It was dark when he examined the prison.

1807.

Jean Joseph Mayon, prisoner of war at Greenlaw, was examined, through the medium of a sworn interpreter,

1807. and stated, that he was in the same room with Cottier on the night of the accident. His hammock was next the window,—Cottier's was next to his in the upper tier. Cottier was wounded at a quarter past nine, while he was in his hammock with his clothes off. At this time the room was as silent as the Court where the witness was delivering his evidence. There was no walking before the accident. He was in bed, and all the prisoners were in bed. There was no light but what was occasioned by a man, in the third or fourth hammock from the window, who, having struck fire from a flint, was lighting his pipe with a piece of tinder. The prisoners were all talking together when the shot was fired, but drinking nothing. No body spoke from without, nor tapped on the window, at least he heard none. Some panes of the window had been broken before the accident; and a shirt was hung up to dry in the inside of the shutters. Upon his cross-examination, he stated, that he knew there was an order to put out the lights when the drum beat; and that it had beat that night before the shot was fired. If any body had spoken from without, he thought he must have heard it. There was once a shot fired through the same window, and two shots fired through two other windows of different rooms; but for what reason he knew not.

Jean Bonchie, prisoner of war at Greenlaw, was examined by means of the interpreter, and stated, that he was in the same room with Cottier, in a hammock which was placed opposite to his, in the lower tier. The accident happened about 10 minutes after the drum had gone round. Before the drum went round, the prisoners were

employed in slinging their hammocks, after which the room was as silent as the Court where he was giving evidence. At the time the shot was fired, two or three of the prisoners were speaking, of whom Cottier was one, but there was nobody walking, and there was neither lamp nor candle, nor any other light but what was occasioned by the fire struck by one of the prisoners from a flint, at which another was lighting his pipe. The whole prisoners were in their hammocks. He heard nothing on the outside of the prison, nor any tapping upon the window, nor was he sensible of any storminess of the weather, nor of any noise from without; that had there been any such, from the situation of his hammock, he must then have heard it. They always heard the guards relieved, and the sentinels delivering their orders to each other. Upon his cross-examination, he stated that the drum was the signal for the lights to be put out, and the noise to cease. He did not think there was any thing in the inside of the window. This was the second shot that had been fired through it. 1807.

Nicolas Marie Legau, prisoner of war at Greenlaw, being examined by means of the interpreter, stated, That he slept in the same room with Cottier, in a hammock on the left. The accident happened about ten or eleven minutes past nine. There was no noise at the time. No body was saying any thing. The prisoners were all in their hammocks—no light; only he saw Cottier in his hammock striking fire with tinder to light his pipe. No person spoke from without, nor was there any tapping on the window. Orders were sometimes given from without, and they always heard them, but not a

1807. word was said that night. They were always accustomed to light their pipes, and no body found fault.

Simon Theunnessee, prisoner of war at Greenlaw, being examined by means of the interpreter, stated, That he was in the hospital at Greenlaw when Cottier was brought there wounded. Cottier asked him some religious question, and said there was neither light nor noise in the room. Upon his cross-examination, he stated, That at one time, three shots had been fired into the prison in eight days, and that in all, six shots had been fired since he went there. One was with ball, and one in the air. They all knew that the light should be put out at nine, and were told that if it was not put out they would be fired upon.

Robert Renton, surgeon at Pennycuik, proved that the deceased had died of the wound inflicted by the shot.

Major-General M'Kay, stated, That it having been found that improper verbal orders had been given at Greenlaw, he issued new orders to the guard there, dated the 30th September 1805, and there were no other orders written or verbal. The order in the possession of the officer at Greenlaw, is in substance a copy of what he issued as before mentioned, though there are some trifling inaccuracies. He knew of no other orders but these, which were transmitted by him to the agent for prisoners. There could be none contrary to these, and he is assured there were none allowing of any discretion.

Alexander Frazer, principal clerk in the department for

prisoners of war at Edinburgh, stated, That he received 1807. from the Adjutant General's office, certain orders relative to guards at Greenlaw, which he sent there in a letter, written by him, and signed by the agent for prisoners.

Captain James Rowan, of the Lanarkshire militia, stated, That he commanded the detachment at Penny-cuick, in the month of January 1807, from which a guard was sent every morning to Greenlaw. The pannel was sent there on the 7th of January, having under him two serjeants, two corporals, and thirty-six privates; and about one o'clock in the following morning, he received a letter from the pannel, by Dr Renton, informing him of the accident. With regard to the orders, the witness stated, that understanding there had been a verbal order given to the sentinels to fire into the prison, in case the lights were not extinguished upon twice challenging, he altered these orders, and directed the sentinel, in place of firing upon seeing the lights, to go for the serjeant, and the serjeant to go for the officer, who was to be guided by circumstances. His object was to deprive the sentinel of any discretionary power of firing, and to commit it to the officer. Upon his cross-examination, he stated, that the pannel was attached to his company at the time, and that he thought him a person of an extreme mild disposition, very far from quarrelsome or passionate, but quite the contrary, and upon the whole, as good dispositioned a lad as he ever saw. He saw him at his post next morning, and he indicated no desire nor intention of making his escape, either then or afterwards.

James Clerk, Esq. Sheriff, and William Scott, procu-

1807. rator-fiscal of the county of Edinburgh, proved the pannel's declaration to have been freely and voluntarily emitted, and that the pannel was sober, and in his sound senses at the time. Upon their cross-examination, they stated that he gave a fair and candid account of the matter, and was not in custody until the Sheriff thought it his duty to apprehend him.

The pannel's declaration, emitted upon the 9th of January 1807, was then read, which stated, that he commanded the guard upon the prisoners of war at Greenlaw house, on Wednesday last the 7th instant. Declares, That that evening, about ten minutes after ten, the serjeant of the guard called upon him at the guard-room, and said, that there was a great noise in the prison, and said, that he thought they were working with instruments to make their escape ; that the declarant then went out and accompanied the serjeant to the place where he had heard the noise, and there he listened at a window and heard a great noise, and at the same time he observed a light within, upon which he called to the prisoners within to put out the light ; he called a second time, and also knocked upon the window ; and these orders not being attended to, he ordered the nearest sentinel to fire into the window, and he did so immediately ; that there was a cry, which he supposed to be from some person wounded ; that he did not intend to kill any person, and he is sorry that the shot has had so fatal an effect ; that the declarant apprehended that the prisoners were engaged in something improper that night, and thought that they were doing something towards their escape. Declares, That he knows that Charles Cottier, the person wounded, died the next day in conse-

quence of the shot he received upon that occasion; and 1897.
the sentinel fired entirely by the declarant's orders. Inter-
rogated, If he did not know that there were written orders
or instructions for the guard doing their duty over the pri-
soners? Declares, That there are; and a copy of them was
lying in the guard-house, and he had also read a copy of
them, which Captain Rowan received from the Captain of
the former detachment, and he now sees a copy of said or-
ders, and has marked the same of this date as relative hereto.
Declares, That besides these he understood there was a ver-
bal order, that if the prisoners did not put out their lights
upon being twice called to they might be fired upon; that
he cannot say from whom this order came, for he did not
receive it from Captain Rowan or any of his commanding
officers, but understood that it had passed from guard to
guard, and that there was no other compulsitor to make
the prisoners put out their lights.

The written orders transmitted by the Adjutant-Gener-
al to Greenlaw, were then read as follows:—

*Orders for the Guard at Greenlaw doing duty over the Pri-
soners of War.*

At each relief of the guard the officers of the old and
new guard will immediately inspect the whole of the pri-
son in every part of the house (attended by one of the of-
ficers employed under the agent) to see that all the doors,
locks, &c. are secure and sufficient, and take notice of any
damage done by the prisoners, and report the same to the
Captain of the detachment.

The charge of the prisoners within the house, and all the

1807. interior economy, being under the orders and management of the agent for prisoners, all and every assistance that he may require of additional sentinels, &c. to be furnished at his requisition, and, in case of any disturbance, riot or attempt to escape, the same assistance to be given to the jailor or keeper, and if absolutely necessary, to be repelled by force.

The sentinel will fire at any prisoner in the act of escaping or attempting to run off, and not immediately stopping when so challenged or called to by the sentinel.

The officer of the guard will frequently, during the night, visit his sentinels, to see that they are alert, and to learn if any noise has been heard by them, such as might denote any attempt at breaking out or undermining the walls.

The non-commissioned officers will observe the same each time they go round with the reliefs, at which time they are to be accompanied by one of the turnkeys, and immediately report any thing they see or conceive to be wrong to the officer of the guard.

No spirits of any kind to be allowed to be brought into the prison, or any communication to take place with any of the prisoners but such as is permitted by the agent or his keepers, and no soldiers or women belonging to the detachment to be allowed to sell any spirits, &c. to the prisoners, or to the soldiers on duty.

No soldiers or any other person whatever to be allowed to walk or loiter near the palisades of the prison

within the sentinels posts, or inside, where the sentry boxes 1807.
now are placed, excepting when the keepers are going }
round, or otherwise allowed by the agent.

The agent for prisoners having agreed to supply what may be necessary to put the officers' and other guard-room into complete repair, and to furnish them according to custom ; an inventory will be delivered to the captain of the detachment of every thing, and another to be left with the officer of the guard, who will deliver the same in good order to the officers relieving them ; a copy of this inventory to be given to the Barrack Master's department.

No non-commissioned officer of the guard is to go further from the guard than the avenue in front of the house, and not without the gate ; and the men are on no account to go through the neighbouring fields or parks, as they are let to other individuals.

No person whatever to be allowed to come within the avenue, or near the prison, (the officers of the navy and army, being in their uniforms, excepted) without the permission of the agent for prisoners.

A serjeant of the guard, attended by one of the turnkeys, is to attend the markets, usually allowed to the prisoners, and follow such regulations as the agent for prisoners will give.

(Signed) ALEXANDER MACKAY,
Depute Adjutant-General.

Adjutant-General's Office,
Edinburgh, 30th September 1805. }

1807. *Copy Letter, Malcolm Wright, Agent for Prisoners, to the
 Officer commanding the detachment doing duty over the
 Depot for Prisoners of War at Greenlaw, Pennycuik.*

Edinburgh, 2d October 1805.

SIR,

By desire of Major-General Mackay, I inclose a copy of a paper of general orders for the guard doing duty over the prisoners of war at Greenlaw, transmitted to me on the 30th of last month, with directions to put up one duplicate on the guard-house, and to give another to the Captain of the detachment.

I have the honour to be, &c.

(Signed) MALCOLM WRIGHT, Agent.

*Copy Letter, Ensign Maxwell, R. L. M. to Captain Rowan,
 Pennycuik.*

Greenlaw, 7th January 1807.

DEAR SIR,

I am sorry to mention to you, that ten minutes after ten o'clock, being called upon by serjeant Wardrope, saying, there was a noise in the jail, I went, and examining what the case was, found light in the room, which I mentioned to be put out twice, which was not complied with; I then ordered the sentry to fire, and sorry I am to say, the shot has been fatal.

(Signed) H. MAXWELL,
 Ensign R. L. M.

Here the evidence closed for the Crown, and the pannel proceeded to lead evidence in exculpation.

1807.

Sir Alexander M'Donald Lockhart stated, That he commands the regiment of Lanarkshire militia, which the pannel had joined about 11 months before the accident happened. He had occasion to know him, and found his character good, and his temper extremely mild; for which reason, and from there being few other officers in the regiment who knew their duty so well, having been a shorter time in it, he made choice of the pannel for this service out of the regular line of his duty. The guard at Pennycuick consisted of one captain, three subalterns, an assistant surgeon, and 100 privates. At Greenlaw there were 36 privates. After the accident, General Leslie instructed a field officer to go regularly and see what was doing. Had the witness been the field officer, he would have reported the guard as insufficient.

Corporal M'Kensie, of the Lanarkshire militia, stated, That he was with the detachment on duty at Greenlaw in January 1807, and it was his duty to post the sentinels round the prison, and he received orders to be given to these sentinels, which were, that if any prisoner attempted to escape by going over the railing, the sentinel was to call twice, and then fire. If they made noise after tattoo beating, the sentinel was to call with a distinct voice, and if not obeyed, he was to fire. The witness gave these orders to all the sentinels he posted. He gave them in the hearing of Lieutenant M'Lean, who expressed no disapprobation.

Lieutenant M'Lean, of the Lanarkshire militia, stated; That he was an officer on guard over the prisoners at Greenlaw, and that it was his duty to go round and see

1807. the sentinels posted and the orders given. Upon his arrival at Greenlaw, he went round with the sentinels, and heard them get their orders from the sentinels of the old detachments; the import of which was, that if the prisoners attempted to escape, they were to fire, and they were also to fire if the lights were not put out, after challenging three times so as the prisoners might hear. The officer of the detachment he relieved was present at the time, and neither he nor the witness countermanded the order. Upon his cross-examination he stated, that he heard Captain Rowan read certain instructions to the officers, but there was nothing in them directing the prisoners to extinguish their lights at nine o'clock.

Thomas Aitken, private in the Lanarkshire militia, stated, That in December last he was posted at Greenlaw, as a sentinel upon the prisoners. The orders which he received from the corporal who posted him were, that if there was a noise or lights in the prison, he was to challenge twice, and if no answer was made, and the noise and lights continued, he was to fire into the prison. An officer was present when he received these orders. He fired once into the prison in the month of December, because the lights were burning, and there was a great noise. He called to them, and received no answer, but a great noise, and laughing continued. He repeated the call a dozen of times and better, and at last fired in at the window, and called for the officer and serjeant of the guard. The prisoners said they did not hear, as it was a severe stormy night at Christmas.

Lieutenant Murray, of the Lanarkshire militia, stated,

That he was with the detachment at Greenlaw in December 1806, and was on guard. Part of his duty was to visit the sentinels in the prison. The sentinels took their orders from those they relieved, and the officers on guard afterwards inquired at the sentinels with regard to these orders. There was a verbal order to fire upon the prisoners in case they should attempt to escape, after challenging three times; and there was also a verbal order, though never given to him, that in case of light or noise within the prison, the sentinels were not to fire, but to let the officers know. He knew that Aitken, the preceding witness, had fired into the prison, and he told the witness, upon his inquiry, that the prisoners were very riotous, and had knocked out the window. There was nobody hurt upon this occasion, and he thought Aitken was doing his duty; as he had challenged eight or nine times, and the prisoners were behaving very riotously. They were often noisy and turbulent, but never so much as that night, being Christmas. 1807.

David Inglis, private in the Lanarkshire militia, stated, That he was with his detachment at Greenlaw in winter 1806, where he was sometimes posted as a sentinel on the prisoners. He received orders to see that there was no undermining nor attempting to escape, and in case the lights were burning after the drum went round, he was to challenge three times, and then fire. He had no orders to call the serjeant.


Peter Cameron, the turnkey, was again examined, and stated, That he had been jailor for about four years. In January 1807, there were 300 prisoners within the house.

1807. They had sometimes attempted to break prison, and had effected their escape over the railing, and once from the prison. He remembered of four having made their escape, and there was once an attempt made to undermine the walls, but this was long before Januray 1807. He has known sentries fire into the prison several times before this accident, but none of the prisoners were ever hurt.

Here the evidence closed for the pannel, and the Lord Advocate then proceeded to charge the Jury as follows :—

GENTLEMEN OF THE JURY,

In addressing you in this case, I rise with feelings more painful than I have ever experienced in the course of any professional duty in which I have been engaged. The circumstances connected with this trial, are of a very singular nature. The melancholy fact is of no common magnitude, nor does it produce sentiments of an unmixed nature, nor lead directly to one plain and obvious conclusion, but on the contrary, in its whole bearings, presents different views, and leads to very opposite conclusions. Before I proceed to call your attention to the evidence, allow me to mention one circumstance attending this trial,—a circumstance connected with the administration of our law, and which exhibits a noble and dignified view of British justice. The deceased, whose death is now the subject of discussion, and in consequence of which there is raised a criminal prosecution in the name of the sovereign of this country, was a prisoner of war; a person engaged in the service of that powerful man, who has endeavoured to subjugate this kingdom; a person in actual hostility with us, and whose life has per-

haps been saved, by the generous exertions of some of the 1807.
gallant defenders of our country; and yet this individual, 
unknown here, and perhaps obscure in his native land,
has been placed by the protection of our law, in the same
situation as if he had possessed all the privileges of a Bri-
tish subject. On the other hand, the pannel, who is
brought to trial, charged with a capital crime, is a British
officer; a soldier meritoriously employed in the service of his
country, and forming a part of her military establishment;
and yet he stands in his present situation, because he has
failed to yield proper respect to the law, by protecting, in
place of injuring those who are secured by it. Such is
the system which has made Great Britain high and emi-
nent among the nations; a system which proceeds without
distinction or respect of persons, to bring all those fairly
to trial, who stand charged with the commission of crimes.
She does not act upon principles of retaliation, nor adopt
the practice of others, as a rule for herself, but pursues
her own unpolluted, unerring course of justice, abhorring
to punish one crime by the commission of another. By
such conduct, there is created the character of a people
whose virtues are courage accompanied with humanity,
and loyalty uncontaminated with servility, and whose re-
lish for rational freedom, preserves them alike from the
horrors of anarchy and the dangers of a foreign yoke, while
it promotes public prosperity, and individual happiness.

Leaving, however, these general remarks, which I trust
you will not deem out of place, I shall now request your
attention to the nature of the pannel's defence, in connec-
tion with the evidence; and I am happy to think, that

1807. whatever I feel it my duty to state in this way, must be offered under correction from so many quarters.

By the law of Scotland, homicide is of three kinds, either such as infers no punishment, or a punishment not capital, or the punishment of death. Homicide, liable to no punishment, is either occasioned casually, from pure misadventure, and without any intention, or intentionally, and in that case, is justifiable, from a principle of duty or of self-defence. To this last species of homicide alone, it is necessary to call your attention, because it is to it that I understand the pannel's defence to be meant to apply.

In order to make out a case of justifiable homicide, the pannel must be able to shew, that the death of this man arose in consequence of an act of his, in the discharge of his duty as an officer stationed upon guard, and having charge of the prisoners at Greenlaw; and it must be proved to have been an act which he had a right to do, and was bound to do. Such is the description of justifiable homicide.

Now there appears to be two grounds on which the pannel may maintain his plea; 1st, That orders were given which he was bound to execute, and that being a mere machine in the hands of others, he had no alternative but to obey; and, 2dly, Not that he had specific orders which as an officer he was bound to obey, but that, in the situation in which he stood, having certain discretionary powers, he was authorised to use them;—that it was his

duty to use them,—and that in the use of them this man 1807.
was killed.

The orders having been sufficiently established, I shall begin with those which were the regular orders, coming from the proper office, to the commanding officer at Greenlaw; and here the first question is, was the pannel bound, or was he entitled, had these been the only orders existing, to command this soldier to fire, and to kill any of the prisoners whom the ball might happen to strike. These orders are before you, Gentlemen, and you will consider them deliberately. There appear to be only two parts of them that bear upon this question. The one relates to the very case of disturbance, riot, or attempt to escape; and you will attend to the words in it. ‘ The charge of the prisoners within the house, and all the interior economy, being under the orders and management of the agent for prisoners, all and every assistance that he may require of additional sentries, &c. to be furnished at his requisition; and in case of any disturbance, riot, or attempt to escape, the same assistance to be given to the jailor, or keeper, and if absolutely necessary, to be repelled by force.’ Here, Gentlemen, all that is stated is, that in the event of tumultuous proceedings, they are to be repelled by force. But it is impossible to maintain, on looking back to the evidence, and supposing the noise to have been much greater than it is proved to have been, that it was such as required to be repelled by force. All that was necessary was for one of the soldiers to go round the house and examine into the cause of it, and order it to cease. There was not the slightest danger of an escape. The place was sufficiently

1807. secure, having a guard of thirty-six men, and sentinels, with loaded muskets, both on the outside and inside of the prison, while within the room what was there but a set of unarmed, defenceless men, wholly incapable of doing any injury, or even of defending themselves if attacked? But the orders proceed to make mention of a situation where firing might be proper, and where accordingly an order is given to fire. 'The sentinel will fire at any prisoner in the act of escaping, or attempting to run off, and not immediately stopping when challenged or called to by the sentinel.' Now here the written orders specify the only case where firing is to take place; and they mention that where there are no other means of preventing the escape of a prisoner, the sentinel is to fire upon him so as to prevent his running off. But will it be said that there is the slightest evidence here of the prisoners having been in that situation, or of any attempt to escape that could justify or call for firing? When, therefore, the regular orders are attended to, it appears that they did not enjoin any such step as was here taken; and, consequently, that no person, acting upon them, was entitled to do what the pannel did. But besides these written orders, there appear to have existed what are called verbal orders; and certainly my opinion is, that the pannel should have the benefit of every circumstance that may be in his favour, and I am willing to allow that it is proved that the former detachment did transmit, from sentinel to sentinel, and even, in the presence of officers, an order about firing when a noise was heard, or lights not put out. All the witnesses do not precisely agree in their account of this matter. But, in general, the evidence seems to amount to this, that when repeated orders were given, and

disobeyed, for the noise to cease, or the lights to be extinguished, the sentinel was to fire into the prison; and this order passed from detachment to detachment, and came to the Stirlingshire when they mounted guard at Greenlaw, 1807. It appears further, that the severity, and I must say the inhumanity of this order, was in some measure corrected by Captain Rowan of the Lanarkshire militia; for finding that such a rule existed, he did give an order rectifying it, and declaring that no sentinel should be at liberty to fire, even although he had directed the lights to be put out, and had been disobeyed. All that he was to do, was to report to the serjeant, who was to tell the officer, and he was to judge and exercise his discretion in the matter. The officer was not bound to fire; he had no orders to fire, even if the lights had not been put out; he was allowed to act according to circumstances. Such is the sum of the matter, in point of fact, a verbal order transmitted from guard to guard, and that rectified so as to bring every thing under the discretion of the officer for the time.

It may admit of some doubt, in point of law, how far such an order could be at all acted upon. When the life of a fellow creature is at stake, no officer ought to act upon orders which do not come authenticated to him in some regular shape. They had here written orders posted up in the guard-room which were to be the proper rules for their conduct; and I have great doubts whether they were entitled to deviate from the express rule there prescribed. But supposing that doubt resolved in favour of the pannel, the next question is, whether, having before him the written orders transmitted from the Adjutant-General's office, modified and restricted by another order from the

1807. officer on guard, the pannel was entitled to take it upon him to do an act, the consequence of which was the necessary, and almost inevitable, death of one of the prisoners under his charge. To judge of this, Gentlemen, you will please to look at the evidence more minutely; and it appears that, with respect to noise, a very different account is given of the transactions that were passing. That there was some noise in the prison seems to be clear, but not a great noise, not by any means such as justified the suspicion of an attempt to escape; and, in point of fact, there certainly was no such attempt to escape. Now it is not alleged that there was an order to fire whenever there was noise. The firing could only be justified when it was such as to afford a clear and decided indication of an attempt to escape. The only other exculpatory circumstance is the light that has been mentioned; and I have no hesitation in admitting, that I think it is proved there was light in the room, whether from a candle or a tobacco pipe it is impossible now to say, but light is certainly sworn to by the serjeant, and the sentinel who fired does say, that although he saw no light at first, yet, after the shot, he saw light through the hole in the shutter. Consequently there was at this time light in the room. Whether it continued when the people went into the room is a different question; I am disposed to think there was then no light, from the circumstance that a lamp was obliged to be carried into the passage, and from the probability that the prisoners would extinguish their lights when the shot was fired. Under all these circumstances, Gentlemen, it being left to the discretion of the pannel to fire, you are to consider whether that act was here justified,—whether he exercised that prudent, that considerate discretion which an officer was bound to exercise with


humanity when he gave orders to put a fellow creature, 1807. and perhaps more than one fellow creature, to death. I maintain that this was not justifiable homicide. He ought to have gone round and inspected the prison, to have examined what was passing, and to have conducted himself with deliberation and reflection. Surely it was proper to take some little trouble to discover whether these poor men, who lay at his mercy, were so trespassing against the law, as to leave no remedy, no alternative but death. I say there was no principle nor feeling of duty that could warrant such an extremity. To render homicide justifiable, the party who commits it must not only have a right to do what he has done, but be bound to do so. Such is the definition that is given of it by our greatest lawyers. He who acts with a determined purpose of killing, and he who betrays a degree of indifference about the lives of others, are equally punishable by law. With regard to these verbal orders, they are such as no officer ought to have paid any regard to. It appears that different orders of that kind were given from one guard to another, insomuch that the prisoners were to be fired upon when they put their hands beyond the palisades. Orders in short were given, but be they what they may, the pannel was bound to exercise a discretion, and exercising that, he ought not to have fired. The prisoners within, might not have heard his order to extinguish the light; and indeed this circumstance is not very clearly proved one way or another. All the prisoners state that there was no such thing; and they all admit that they knew that if they did not put out the lights when the drum went round, they were liable to be fired upon; and knowing this, I think it is at least possible

1807. they never heard the orders given ; but whether they did so or not, it would have required more caution before proceeding to give the order to fire. Their conduct in not putting out the lights was to be considered as mutinous, perhaps, but what was to be done in consequence of it ? The particular person was unknown ; and not that person was to be punished, but an indiscriminate random shot was to be fired, which might have struck the innocent as well as the guilty. Justifiable homicide, therefore, being entirely out of the question, there still remain two different degrees of guilt to be considered. The indictment charges murder, but under that charge it is competent for you to return a verdict finding the panel guilty either of murder, of which the punishment is death ; or of culpable homicide, of which the punishment is arbitrary, short of death, at the discretion of the Court. It is now a settled point, that though an indictment charge murder, it admits of either verdict being returned under it. But though the verdict of culpable homicide is competent in the present case, it is for you to consider whether the circumstances before you do not amount to the crime of murder. They certainly cannot be construed into that species of culpable homicide where there has been provocation ; and if they are to be so viewed at all, it must be upon the ground that there was no intention to kill, though perhaps to frighten, the prisoners, or to do something different from killing them. Now the nature of the place, and the situation of the prisoners, is clearly proved ; they were shut up in a room twenty feet square, thirty-one beds being placed in two rows, one below and another above. Two of these were opposite the window where the sentinel was ordered to advance

and fire; and where it was almost impossible to fire 1807.
without killing. This was to be done with a musket
loaded with ball, and the sentinel had no orders for rais-
ing his piece, or firing at the roof, but to fire straight in
upon them. The intention therefore admits of no doubt.
He had the intention to kill, no matter whether this or
that individual. It was to kill some one or other of these
unfortunate men. Under these circumstances, you will
consider what your verdict should be; for although I
have stated the evidence as sufficient to warrant a verdict
of guilty, I am ready to admit, that had the pannel been
aware of the result of the firing, he would not have act-
ed in that manner. But still it remains for your mature
deliberation, whether, where such wanton indifference ap-
pears for the lives of others, any such considerations can
be allowed, to take this case out of the sphere of murder.
You will judge for yourselves, and no doubt perform
your duty. For my part I hold, that no alternative re-
mains but that I must make the request, painful as it is,
that you return a verdict of guilty.

MR GILLIES.

It is now my duty, Gentlemen, to address a few words
to you in this unfortunate case. I term it so, whatever
its result may be; and I trust, that of that result there
can now be very little doubt. Looking forward, as I do
with confidence, to a verdict of acquittal, I still must
consider the event as unfortunate, in the highest degree,
which has given rise to this trial. That event the pannel
has uniformly and deeply regretted; and I am authorised
to say, that he will continue to regret it down to the last
hour of his existence. I firmly believe that he will do

1807.  so; for, in the whole course of my practice in this Court, I never entered its walls more thoroughly convinced of any thing, than I am of his innocence of the charge of murder. I have had to deal with one; who, from the origin of this affair, has been sensible of what is due to his own character,—who has been ready to give himself up to justice, and has, on all occasions, delivered an open and candid account of the whole circumstances of the case. Receiving information from him, I have trusted it with implicit confidence, coming from a gentleman, and a British officer; and, under all the circumstances, I was satisfied, that the charge of murder would vanish as completely from the minds of a jury, as it seems to have done from the view of the public prosecutor. I anticipated with confidence, that culpable homicide must be the sum and amount of the accusation against my client; but yet I felt a degree of anxiety, such as I have seldom experienced, even in cases of greater importance, arising partly from a just diffidence in myself, though chiefly from the reflection, that upon you and upon this Court alone depended the fate of the prisoner. To the mercy of the Sovereign, there are peculiar circumstances of difficulty in this case which may satisfy you that it would be difficult, if not impossible, to make a successful appeal; and, in short, I felt that this day and your verdict were to be decisive of my client's fate. But, from all this anxiety I confess I have been completely relieved by the speech of the Lord Advocate, who, almost waving the charge of murder, has considered the evidence merely as it relates to the plea of justifiable or culpable homicide.

In directing your attention to the evidence, it is necessary to look at the character and situation of the person

accused. His situation in life is known to us all ; he is a British officer, and his character you have heard this day, given him by those who have had the best possible opportunities of knowing him. You have been told by them, that he is one whose conduct and character did credit to his situation,—that he was uniformly distinguished for the mildness of his temper and disposition ; and that he was for this reason, and no doubt for other qualities honourable to himself, pitched upon, by his commanding officer, for discharging the duties of officer on guard at Greenlaw. 1807.

Such is the character of the gentleman against whom this heavy charge has been made. His situation also was peculiarly delicate. He was placed as commander of the guard, whose duty it was to prevent the escape of the prisoners confined in the house of Greenlaw. I am far from wishing to impute blame any where ; but yet it appears to have been the opinion of several officers, that this guard was not sufficiently numerous. There had been frequent attempts to escape of a desperate nature, which would have rendered a stronger guard necessary. Such was the situation in which the prisoner was appointed, with a guard of 36 men to secure and confine the crews of French privateers, amounting to upwards of 300, who felt themselves entitled to escape under any circumstances of danger to those who guarded them ; and his situation, therefore, merely as an officer, gave him rights, and imposed upon him duties, which a bare civilian can never know, or be bound to observe.


The law has made full provision for the singular circumstances in which soldiers stand in this respect. They

1807. have been found entitled, when in danger of being exposed to violence, driven from their posts, or stripped of their arms, which subjects them, by the military law, to death, to guard against such attacks by means which would not be indulged to other persons. The law is, that an officer, in defence of his post or arms, or where he conceives these to be in danger, is in duty bound to have recourse to measures of force, which in other circumstances would be illegal and criminal. The law upon this subject is well stated by Hume in his commentaries. The occasion on which it is laid down is that in which soldiers feel it to be their duty to have recourse to force, as in the case of riots and tumults; in resisting which, or in preventing danger, they are entitled to repel, force by force, and to suffer nothing to be done which would subject them to military punishment. The magistrate has a discretionary power to order the military to fire, upon reading the riot act. Nothing more is necessary; but, if the tumult be such as to prevent him from doing so, he is at perfect liberty to proceed without it. Not only so, but the military are authorised, in certain cases, to fire without the interference of the civil magistrate; and consequently without reading the riot act.

Mr Hume, speaking of the situation of a soldier, states, that ‘not only the hostile invasion of his person with
‘arms, but any violent attack upon him with other
‘weapons, or any outrageous and alarming tumult raised against him, when on his post, or in his duty, authorises him to be active in repelling it; and shall indemnify him for any slaughter that ensues. Not
‘that he can be justified (no one can be of this opi-

‘ nien) for mortally resenting a slight indignity, or for 1807.
 ‘ quelling every insignificant disturbance with force of
 ‘ arms ; but this only, that, being invaded in his duty, he
 ‘ shall be justified by a much lower violence and inter-
 ‘ ference, than would be necessary to excuse another
 ‘ man.’

Such is the doctrine of Hume, which has been sanctioned by various judgments of the Court ; and cases have occurred, since he wrote, in which officers and soldiers standing at their posts, have been found entitled to use force, though attended with fatal consequences ; a privilege which never could be indulged to persons acting in a civil capacity. But all this regards the conduct of soldiers to citizens of this country,—to men acting under the same laws with themselves, and bound to give equal obedience to them. But the persons against whom the prisoner had to protect his post were not subjects of this country, but prisoners of war, entitled indeed to a protection ;—I am far from denying that position in its fullest extent ; for we do not follow the law of retaliation, which is unknown to British officers, from a regard to the dignity of their character, and to that of the King whom they serve. But, while this is to be admitted on the one hand, view the dangers to be apprehended from it on the other. These men are subject to no law whatever. They acknowledge no law. They are kept there by force, and by force alone. They are not like prisoners confined for debt, or upon suspicion, or conviction of crimes ; for these are all subjects of this country, and cannot break prison without offending against its laws, which they are bound to obey. But prisoners of war conceive themselves

1807.  at perfect liberty to make all sorts of attempts to escape, and by every possible means, whether by force, fraud, or stratagem; and were they even to succeed in driving, by violence, every sentinel from his post, and putting the whole of them to the sword, they would be considered, by their own country, as having done a most meritorious action. At the same time you will observe, Gentlemen, that while such was their situation, and while such desperate attempts were to be apprehended from them, they were undoubtedly subject to the military law of this country, being in a situation in which an equal, if not a greater, degree of obedience was required from them, than from soldiers under the command of an officer. There can be no doubt that they might be guilty, and it is proved that they were guilty of mutiny; for the accounts and attempts to escape, by undermining the walls and otherwise, that are spoken to by the witnesses, clearly amount to mutiny; and it is therefore proved, that they were guilty of this breach of the military law. There was a general order, that the lights and the noise were to cease at nine. They were guilty of mutiny when they disobeyed these orders. But not only were they disobeyed, but, when once and again repeated, were treated with contempt. They were therefore guilty of mutiny: and here were a set of men, subject to no restraint, but at liberty to make their escape by any means, and guilty, at the same time, of an act of open mutiny.

I say, therefore, that if the case were to remain here, —that if these general orders had not been obeyed, but disobeyed, when repeated, he was entitled to call this mutiny, and to act as seemed best at the time, according to

his discretion. The case, therefore, just comes to the point 1807. where Mr. Jeffrey landed, when he stated the defence; only that, as the evidence has now turned out, it has assumed a different aspect; for not only was he bound to act according to his discretion, but, as appears, he was under orders which left him not at liberty to follow his discretion, since he was bound to obey them. He might have disobeyed, indeed, as a matter of discretion, but obedience was his duty; in discharging which he was safe. If he disobeyed, it was at his peril; and he was responsible for the consequences.

I am now referring, as you will perceive, Gentlemen, to the verbal orders which, it appears, were given out to all the guards that were stationed upon this prison. It is true that certain written orders were given out at the same time; and it seems to be thought, that these last were the only orders that they were bound to obey. These written orders, however, contain nothing that is applicable to the present subject. They direct nothing as to the hour of shutting up,—as to the hour when it was the duty of the jailor to secure the prison. This, therefore, behoved to be a matter of separate regulation, and accordingly so it was regulated; for it is sworn to by every one witness who has been examined, that there was a general order for the prison to be shut up at nine. No noise after this, nor no lights. French and English, civil and military, all concur in this, that from the hour of nine, there was an order, understood by every person within and without the prison, that all noise should cease. Where do you find this order? You find it not in the written orders; these relate to matters totally different.

1807. But it is clear, in point of fact, that there were such orders, verbal indeed, but universally known and understood, both by guards and prisoners, that the lights and noise were to cease, and the prison doors to be shut exactly at nine o'clock at night, otherwise there neither was nor could be any regulation, as to these necessary and important matters. But, as there were no written orders upon this subject, how could there be a written order directing the conduct of the soldiers, in the event of the verbal order being disobeyed?

It has been said that he acted improperly, because he did not conform himself to written orders; but the answer is, that it was totally impracticable, since the disobedience was to verbal orders, and not to written orders. As the written orders contain nothing upon the subject, it is obvious that there could be no breach of them. The whole of this matter therefore was verbal,—verbal orders that the prison should be shut at nine, and no noise or lights suffered after that hour. The conduct prescribed to the officer was also verbal; and to that he was bound to give implicit obedience.

Now what were these orders? They were, that in the event of lights not being extinguished, or noise not ceasing at nine, the sentinel was to give two repeated calls; and that, in the event of both being disobeyed, the offence was to be considered as open mutiny; and he was to fire upon the mutineers. It is true that one officer, Captain Rowan, thought it his duty to say, that though he could not commend this course of proceeding, he appointed it to continue under certain limitations and restrictions.

These were merely this, that the sentinel was not to fire, 1807. but to report to the serjeant, and to the officer. But farther than this the limitation did not go. He stated that he by no means meant to do away the order, but simply to transfer this discretion from the sentinel to the officer. He merely says to the sentinel, the officer is to be informed of any disobedience of orders : he comes in your place : he is to order the extinction of the lights, and the cessation of the noise ; and then he is to do precisely what it was formerly your duty to do as sentinel. Such being the orders, how were they acted upon ? You have seen how they were acted upon, both by sentinels and officers. This is not the first shot that has been fired into the prison ; you have heard evidence, that upon no less than six former occasions the same step has been resorted to ; and here I must remind you, that not one of these six shots has ever proved fatal ; a circumstance which gave the pannel no reason to suppose, and accordingly he did not suppose, that any consequences, and far less of so deplorable a kind, were to result from his orders. But what I would particularly impress upon you is, that there were here verbal orders to fire under certain circumstances, to which it is proved, that full, distinct, and uniform compliance was given. You have the evidence of two privates who fired, and the officers, who declare, that if they had been on the spot they would have authorised them to do so ; and probably there is not a subaltern officer in the regiment, who, if he had mounted guard on the night of the accident, would not have been placed in the situation in which the pannel now stands.

1807. This was the state of things on the 7th of January.

The pannel knew of the verbal orders; he had heard them communicated from sentinel to sentinel; he was aware that they had been repeatedly complied with, and that the compliance was recent; and under all these circumstances he mounted guard. He was sitting alone in his own room at half past nine, when serjeant Wardrope came in, and reported that there was a very great noise in the prison. A good deal has been said upon this point; and if you were to believe some witnesses, you would be led to suppose that there was no noise. But it is impossible to credit such statements for one single moment. The very circumstance of a man like serjeant Wardrope coming with a report to the officer on guard, affords real evidence, not only that there was noise, but that there was an alarming degree of noise in the prison: You must at once be sensible of the total impossibility of the fact being as stated by these witnesses; and yet, that the serjeant should think it his duty to go out in a dark night to report to the officer that there was noise, and to request that he would come and give the necessary orders. This he never would have done upon a trivial occasion. His conduct affords real evidence of the noise; and indeed it is distinctly proved both by Hamilton and Gow;—Hamilton, who heard it distinctly on the outside of the palisade; and Gow, who heard it equally well within. The pannel was anxious to do his duty well. He was told that there was an alarming noise; he accordingly went to the prison. The noise had then increased; he heard it distinctly, and saw lights: And what was he to do under these circumstances, keeping in view his previous orders?

It is clearly proved that he gave repeated orders to the prisoners to stop the noise, and to extinguish the lights; notwithstanding of which, both were continued. 1807.

These were the circumstances in which he was placed, having under his charge 241 prisoners, composed of the crews of French privateers, guilty of a gross disobedience of orders, and perfectly aware of the consequences of such disobedience;—aware that, if they did not extinguish their lights, and cease to make noise, they would be inevitably fired upon. What was to be done, therefore, by this young and inexperienced gentleman,—the conduct of these men amounting to open mutiny, lights burning, and the noise not partial, or proceeding from one or two, but from the whole body of them, in opposition to repeated orders, justifying no other inference, but that they were engaged in some desperate enterprise, persisted in at the known hazard of their own lives? In such a crisis, it was impossible for the pannel to hesitate in complying with the orders which he conceived himself bound to obey; and he thought he was performing an act of humanity and mercy to these prisoners themselves; for if they had succeeded in effecting their escape, the whole guard would have been called in, and instead of one man, perhaps a hundred might have fallen. He was actuated by every motive. If he looked to the conduct of his brother officers, the state of this prison, or his own situation, having a desperate attempt to apprehend from men who continued to make noise, and to burn lights, knowing it to be at the imminent hazard of their own lives, it would have been wonderful indeed if he had acted differently from what he did.

1807. Here there can be no malice, nor bad intention of any kind. The case is that of a man acting *bona fide* in the discharge of a high and perilous duty. The accusation of murder is therefore altogether out of the question ; and, even as to a verdict of culpable homicide, the circumstances are by no means such as to warrant a demand for it. The pannel acted from the purest and best motives at the time, with all the discretion and judgment of which he is possessed ; and upon this ground alone, a charge of culpable homicide might be repelled, if I am right in what I have said as to the orders. He stands now at the bar for having performed an act which he was called upon to do by a regard for his duty, as well as by the resolution which became him, as a British officer, to maintain the post at which he was stationed. And, under all these circumstances, I conceive myself justified in calling for a verdict of not guilty.

The LORD JUSTICE CLERK then charged the Jury as follows :


GENTLEMEN,

This is indeed a very distressing case,—I think altogether the most distressing that this Court, or any Jury, were ever called upon to consider. It is a case, undoubtedly, in its result, of a most melancholy nature, involving consequences which the pannel has told you, and which, you may well believe, he will regret to the last hour of his life. It involves other consequences of a nature still more serious ; because it is impossible for us to disguise them to ourselves ; I mean the possible effects of this trial upon an enemy, bound by no law, and actuated by no feelings but

those of malice and hatred against this country. But, 1807.
God forbid, Gentlemen, that either you or I should suf-
fer ourselves to be influenced by considerations of this kind.
I trust that we shall both of us do our duty, with firmness
and justice on the one hand, and without partiality on the
other. I shall deliver you my opinion upon this case, and
I trust you will deliver back your verdict to the Court, in
the same way as if there were not a single British pri-
soner in France.

It is not necessary for me to go through this evidence
much in detail. It has been taken down in your own
presence; it is fresh in your memories, and you have your
notes to refer to; so that I shall only advert to it so far
as is necessary to illustrate the doctrines in point of law,
which alone make this a doubtful case.

That a prisoner at Greenlaw, of the name of Charles
Cottier, was killed by a shot fired in consequence of orders
given by the pannel at the bar, of which wound he died
next day, is proved beyond all question; and, therefore, it
lies with the pannel to justify the act that he committed. The
case must be a case of murder, unless the prisoner can shew
you evidence to the contrary. There are three views of
this case. One of them, which has been taken by the
counsel for the prisoner, is, that it is a case of justifiable
homicide; that is to say, the pannel admits that he kill-
ed the man, but alleges that he did so in consequence of
circumstances, under which he was not only entitled, but
bound to do what he did. It is unnecessary to go through
all the examples of justifiable homicide; because, if the
present resolve into such a case, it must plainly be upon

1807.  the general ground, of a soldier or officer acting in the discharge of his duty. Here there are only two circumstances which can bring it within that description of cases—either that the pannel acted under specific orders, which he was bound to obey without discretion, or that, in the general discharge of his duty, he was placed in circumstances which gave him discretion, and called upon him to do what he did.

We shall examine the matter in both points of view : first, whether he acted under orders received from his superiors ; because, if he did so, be these orders right or wrong, he was bound to obey, and the crime will rest upon those who issued them, not upon him who obeyed them. There is some restriction, however, even upon this ; because, if an officer were to command a soldier to go out to the street, and to kill you or me, he would not be bound to obey. It must be a legal order given with reference to the circumstances in which he is placed ; and thus every officer has a discretion to disobey orders against the known laws of the land. Let us see whether the pannel acted under specific orders. Upon that subject, you have before you what he was certainly bound to look to in the first place—the written orders issued for all the guards that might be stationed at Greenlaw. They state, that the officers of the old and new guard are immediately to inspect the whole of the prison, in every part of the house ; to see that all the doors, locks, &c. are secure and sufficient ; to take notice of any damage done by the prisoners, and to report the same to the captain of the detachment ; of course, I take it for granted that this had been done before when the guard was changed, and that every thing had been then found secure. No symptoms had been

discovered of undermining the walls; none of the doors 1807.
or windows had been broken; all was as secure as it could
be made, and there is no evidence that any change had
taken place. It is not stated that Captain Rowan had
ever observed the prison to be less secure on the 7th of
January than when it was put under his charge on the
27th December; and therefore, there was no more reason
to dread attempts to escape on the 7th of January, than on
the 27th of December. Then, what are the next orders?
They declare, that the charge of the prisoners within the
house, and all the interior economy of the prison, being
under the management of the agent, every assistance that
he may require of additional sentinels, is to be furnished
at his requisition; and, in case of any disturbance, riot,
or attempt to escape, the same assistance to be given to
the jailor or keeper, and, if absolutely necessary, to be
repelled by force. These were the written orders under
which Captain Rowan and his detachment acted; and he
has sworn, that a copy of these were posted up in the
officers' guard-room.

Now, I take it, that part of what we have heard has
given rise to another order of a very serious, and, I think,
a most extraordinary nature. The precise hour at which
the lights were to be extinguished within the prison, was
one of those circumstances that were to be regulated by
the agent. He had probably told the officer of some for-
mer detachment, that nine o'clock was the hour at which
he found it convenient to extinguish the lights and lock
up the prison; and this being signified to the officers of
the guard, one or other of them had taken it upon him to
give the verbal order to his detachment, that if lights

1807. were discovered after the tattoo was beat, the sentinel, on challenging twice, was to fire in at the window. At the same time, (and this should teach all officers how cautious they ought to be in issuing verbal orders), you see very different accounts given even of these verbal orders. Some of the witnesses say the sentinel was to fire on challenging twice; others, on challenging thrice; and a third set swear, that they were not to challenge at all, but to report to the officer; which last regulation, Captain Rowan, with great humanity, and with a caution dictated by his own sound judgment, thought it right to appoint. It is for you, or rather for me, to consider whether, after the written orders were sent, any officer was legally authorised to issue such an order as the verbal one of which we have heard so much; or, if he heard it delivered to his sentinel, how far he was not bound to check it, until he should receive some explanation upon the subject from the office of the Commander in Chief; for all that he was required to do was, to support the economy of the prison, by giving such assistance as should be called for by the turnkey or jailor on the spot. He was to assist in putting out the lights; to assist in quelling the noise; and, in case of attempts to escape, he was, as the orders wisely and cautiously declare, if absolutely necessary, to use force. It was not every attempt to escape that was to justify this extreme remedy; and there was an officer there who could read the orders, and be fully aware of their import.

Now, therefore, what were the orders, which in addition to these, and in furtherance of the internal economy of the prison, Captain Rowan has sworn that he gave.

He says, that upon hearing the orders which his sentinel received, he was sensible of their impropriety ; he felt them to be unjust and inhuman, and being fully authorised, he issued the new order, that, whereas sentinels had been formerly directed, upon seeing lights in the prison, to fire into it upon challenging twice, they should henceforth report what they saw or heard to the officer, who was to be guided by circumstances. He thought it a most dangerous discretion to trust to a sentinel, as indeed it was ; a most inhuman order ; a most inhuman discretion, to commit to a private soldier, without any person being present to direct his conduct, or to witness the transaction ; and when those within the prison would probably, under any circumstances, declare that there had been no light nor no noise. Captain Rowan saw it in this point of view, and without countermanding the order, he altered it so far as to make the discretion rest upon the officer. The sentinel on seeing any irregularity within the prison was to pass the word to the next sentinel, and so on until it should reach the serjeant, who was to come to the spot, satisfy himself, and then go to the officer. And, Gentlemen, with regard to the fatal order which has given rise to this trial, it is a most material feature in the case, that a sentinel who was posted at the window, under one or other of these orders, and either had the discretion to fire, or was bound to send for his officer, has sworn, that he neither saw light nor heard noise, and that he deemed it unnecessary either to fire or to call for the serjeant or officer. Not only did he not fire—not only did he see no occasion to fire himself, but when the order was given him by his officer to fire ;—alas ! Gentlemen, he saw so little necessity for it;

1807.

1807. that he did not believe his officer to be serious. This is a circumstance of real evidence, which speaks more strongly than a thousand arguments. He hesitated to obey an order of his superior officer, and thus he put his own life in hazard, rather than expose the lives of others to unnecessary risk. He was, however, ordered a second time to advance and fire; and upon the piece missing fire, he was ordered a third time, so that he had no alternative left but to obey. Now, Gentlemen, with reference to a case of justifiable homicide, it is a most important circumstance, that the man who acted under these orders equally with his officer saw no necessity to fire. It is said, indeed, that the pannel had no discretion; that the order originally given to the sentinel now attached upon him, and that upon challenging twice he still saw light, he was bound to fire, be the necessity what it may. But if he was a mere machine, acting under an order which left him no discretion, where was the necessity of applying to him on the subject, or of interfering with the sentinel. The difference between the two was certainly of little importance to the poor prisoners; for if they were to be fired upon without consideration of circumstances, it mattered not whether it was by the turnkey, the sentinel, or the officer. But no man of common sense could suppose that he was stationed there for any purpose but that of seeing and hearing, and of course acting according to circumstances. He was to judge of the light that he saw, and of the noise that he heard, and to regulate his conduct by a sound discretion. It seems to me hardly possible for any man not to believe that he was to use his discretion. I think he was bound to believe so, and I am clearly of opinion that he

was not justifiable for the act that he committed. Surely he must have felt that there was no necessity for firing. 1807.

The only question for consideration is, whether, in the situation in which he stood, certainly with an insufficient guard, called upon by the serjeant, who certainly saw more and heard more than other people; who had prepossessed him with a story, and had made him believe that he was to see lights and hear noises; not being also acquainted with the noise of these wooden shoes which appears to have been familiar to the sentinel:—I say, although it is impossible to think that his conduct was justifiable, it is a matter of consideration, whether all these circumstances will or will not protect him from the guilt of murder. For example, suppose a man states, that he acted under the immediate apprehension of danger to his own life. It is not every thing to be sure that a man seems to think danger,—not every idle or foolish apprehension that will do; for if it were so, no such thing as murder could be proved. It must be such apprehension as would shake a man of ordinary courage; as if one man held a pistol to the head of another, and he instantly put him to death, and it turns out that the deceased had not a pistol but something else in his hand, the survivor is by no means free from a high degree of guilt. Allowance will doubtless be made for that hurry and trepidation, which his belief of his danger must naturally produce, though certainly he is guilty of a great degree of rashness; and even though a man be in real danger, but of a slight nature, still the law holds him as highly to blame if he resort to extreme measures. They are

1907. to be tender of the lives of one another, and not to give way to idle fear or wanton rashness. Supposing, therefore, the pannel, in the present case, to have been acting in discharge of his duty, you are still to consider what he saw and heard, and whether there are sufficient circumstances to render that only a rash and inconsiderate act, which in a different situation would have amounted to murder. To constitute that crime, it is not necessary that there should be a distinct and particular malice against the individual, it is enough if there be a general indifference to the lives of our fellow creatures. If a man were to fire at random into the street, or into this room, and death to follow, he is guilty of murder. The only question in the present case is, whether the circumstances of alarm at the time, and of sense of duty, though mistaken, do not diminish the guilt below what is essential to constitute that high offence. These, however, Gentlemen, are really considerations which it is impossible to reduce within any rules of law. They are matters of feeling, of which you are as well qualified to judge as I am. If you think that, in the pannel's situation, you yourselves would not and could not have given the order to fire, you will return a general verdict of guilty; but, on the other hand, if you are of opinion, under all the circumstances, that the order in question amounts to nothing more than a rash and inconsiderate act, then you will return a verdict of culpable homicide, which by law you are now entitled to do.

The Jury next day returned a verdict, finding, by a plurality of votes, the pannel *guilty of culpable homicide*, but, in respect of the imprisonment he had suffered, recommending him to the mercy of the Court.


The Court then pronounced sentence, ordaining the 1807.
pannel to be imprisoned within the tolbooth of Canon-
gate for the space of nine months.

Counsel for the Crown—The Lord Advocate (Colquhoun), Solicitor-General (Boyle), Maconochie, &c.; Agent, Hugh Warrender, W. S. Counsel for the pannel—Gillies, Jeffrey; Agents, Messrs Lockhart and Kennedy, W. S.

THE TRIAL
 OF
JAMES HOLLAND,
PRIVATE IN THE ENNISKILLEN REGIMENT OF DRAGOONS,
 FOR
HIGHWAY ROBBERY.

12th December 1808.

PRESENT,
LODGE JUSTICE CLERK (HOPE)
ARMADALE, HERMAND.

1808.  **THE** indictment stated, that, upon the evening of Friday the 18th November 1808, the prisoner having overtaken John Hay, tenant in Duncanlaw, while travelling on horseback, upon the high road from Haddington to Gifford, wickedly and feloniously seized the bridle of his horse, and ordered him to deliver his money; threatening, if he did not, to blow his brains out; that upon Mr Hay refusing to do so, the prisoner did wickedly and feloniously assault, strike, and beat him upon the head and face, so that he fell from his horse; immediately after which, the prisoner forcibly and feloniously seized, and took from his person, a seal and chain of a watch, his property, and robbed him thereof. Moreover, that the

prisoner, at the same time, wickedly and feloniously 1808. thrust, or attempted to thrust, his hand into Mr Hay's breeches pocket, with the intention of robbing him; when a struggle having ensued, and some persons appeared, the prisoner was secured and taken into custody.

The prisoner pleaded *Not Guilty*; and the libel having been sustained by the Court as relevant to infer the pains of law, was remitted to a jury; upon which the Counsel for the Crown proceeded to adduce evidence in proof of the facts.

John Hay, in Duncanlaw, stated, That he was at Haddington market on the 18th November last, and left the Bell Inn, in that place, at a little past five in the afternoon, in company with James Cunningham in Barra, James Hay in Sheriffside, and William Simpson in Redhill, all of whom were travelling together on horseback, on the road to Gifford. Soon after leaving Haddington, James Hay and William Simpson fell behind a little, in consequence of some bustle, near the town, which had attracted their notice. The witness rode on, and had not proceeded above half a mile, when his horse was seized by the bridle, by a man who demanded his money; to which he answered *that surely the person must be in jest*. Upon this the demand was repeated with a threat, if he did not comply, to blow out his brains. He again said, *that this could not be meant in earnest*, when he immediately received a blow on the left temple; which brought him to the ground; and he remembered nothing after this, until he felt himself pulled along upon his back to a sort

1808 of rising ground, on the side of the road, where he found his head among thorns. He still felt the hand of a man dragging him, and began to struggle; upon which the man sprung back, and put his hand under the witness's great coat. In a little time he put it farther up, and the witness felt him give something a pull, or 'rug,' on his right side, which he supposed at the time was the button of his breeches pocket. Upon this, he seized the man by the collar, and found, by the hardness of it, that he was a soldier. A struggle then ensued, in the course of which, the soldier pulling more violently at the witness, the latter got upon his feet, when the soldier struck him several hard blows, and endeavoured to throw him down, but without effect at first, though afterwards he got his leg behind that of the witness, who immediately fell over, and pitched with his head upon the road, the soldier falling above him. The witness then laid hold of him with both his hands, and kept him down upon his back, in which situation they struggled for some time, until the witness, in trying to get upon his legs, allowed the soldier to get from under him, and they both rose, when another scuffle took place; the soldier striking the witness many severe blows, and swearing that his accomplices would come up and butcher him. The scuffle still continued until they got to the foot of the rising ground, the witness still keeping hold of the soldier. During the time that he was lying insensible, he heard Mr Cunningham's voice, seemingly at a great distance, calling out *murder*, and he still heard him when he had reached the foot of the hill. He then succeeded in driving the soldier into a ditch, got above him, and called out to Mr Cunningham to secure his man. At this time he saw Mr

Cunningham, and also perceived a man running away 1808. from him across the park. He then heard horses' feet, and called out for assistance, as a man had been attempting to rob and murder him. Upon this Mr James Hay came forward and seized the soldier. The witness asked if he had any pistols, to which he answered, that he had only a stick. A cart having then come up, they procured a rope, with which they tied the prisoner's hands, carried him to Haddington, and gave information to the procurator fiscal. The witness then missed the chain and seals of his watch. The chain was broken from the watch, the fragments of the last link being found in his watch-pocket. He swore to the person of the prisoner.

James Cunningham agreed with the former witness as to leaving Haddington on the evening of the 18th November. After passing the Nungate toll, he was attacked and knocked off his horse; and being quite insensible, recollected nothing of what passed, farther than having heard Mr Hay call out to him *to secure his man*.

James Hay also left Haddington in company with the preceding witnesses. He fell a little behind, owing to something which had attracted his notice. Soon after he heard Mr John Hay calling out *murder*. Upon coming up, he assisted in securing the prisoner, and never quit-
ted him until he was in jail. Immediately after the prisoner was put into the cart, he heard Mr John Hay say he had lost a chain and seal of his watch. He also identified the prisoner.

1808. *Mr Simpson* concurred with the preceding witness in all the particulars sworn to.

Other evidence was adduced relative to certain articles belonging to the prisoner, and to authenticate a declaration emitted by him, which stated simply that he had got himself so drunk at Haddington, that he recollected nothing after leaving it, until he found himself upon the cart.

The prisoner, in his defence, adduced Captain Allan and Captain Miller of the Enniskillen dragoons, who both concurred in giving him a high character for steadiness.

After the pleadings on both sides were concluded, the LORD JUSTICE CLERK addressed the Jury as follows:—

GENTLEMEN OF THE JURY,

This is a very short case, and I shall detain you with but few words. There is one of the crimes charged in the indictment, I mean the violent assault made upon the person of Mr Hay, with an intention to rob, as to which I shall say little or nothing; because, if I thought it possible for you to entertain a doubt upon the subject, I should consider any thing that I could say, as very unnecessary indeed. There is here then an assault, and an atrocious assault, upon the person of Mr Hay, with an intention to rob, proved beyond the possibility of a doubt; and as to there being only one evidence, what other evidence can you have? The person himself swears that his horse was stopped by the bridle, and his money demanded. When he said, *that surely this was*

Meant in jest, the answer was a repetition of the demand, 1808. with a threat to blow out his brains, in case he refused compliance. Therefore there is no doubt as to the prisoner's intentions, which were explicitly declared at the time, and followed out by every means in his power. Whether Mr Cunningham heard these words or not, is extremely immaterial; and Mr. Cunningham gave a good reason for not hearing him. He was himself driven from his horse, and became insensible from the blow which he had received, although, in the confusion, he had in fact fought a pretty stout battle, without knowing that he had done so. That you are thus bound in duty and conscience, to find the prisoner guilty of an assault, with an intention to rob, there can be no doubt. It is another question, Whether you are to go a step farther, and find that there was here an actual robbery. Robbery, you must observe, Gentlemen, does not consist in any degree in the value of the thing stolen. When a person assaults another with an intention to rob, it is of no consequence what be the booty which he actually acquires. That depends upon a variety of circumstances, upon the value of the property he may have about him at the time,—whether he deliver the whole of it or not—whether violence be used—whether the prisoner be lucky enough to secrete part of it; and a number of other particulars: but the robbery is committed by the assault and the thing taken; and so far it would have been more correct for the learned author who has been quoted, (Mr Hume) in place of saying, that the robbery is complete when the thing passes into the possession of the robber, to say that it is so when the thing is fairly taken from the person robbed. What becomes of it afterwards, whether the thief secures it

1806. himself, whether he drops it from him on the ground, or may, whether he return it to the person robbed, is of no consequence, provided he has once actually taken it. Therefore, the case comes merely to this narrow question upon the proof, whether you are satisfied in point of fact, that the prisoner did, or did not, by violence, take from Mr Hay his watch chain and seal.

There is here one circumstance extremely material to the robbery, I mean the prisoner's intentions, which are not left to be collected from the testimony of others. The act was not attempted in silence, it was not attempted until the intention had been declared, and the purpose fully spoken out by himself. He demands the money of Mr Hay, with an oath and threat to blow his brains out ; so that you have here his intentions from his own mouth. I can well conceive, that Mr Hay might have lost property without being robbed ; for example, if his hat had fallen off and never been seen again, it would have been a fair argument that it had fallen off in the scuffle by accident, and the presumption would no doubt have been to that effect ; or, in the present case, if this attempt to rob, or actual robbery had been committed when Mr Hay was lying insensible on the ground, and knew nothing of what was going forward, although he afterwards found himself engaged in a violent scuffle with the prisoner ; there at least might be some room to argue that his chain had fallen from him, or had been torn away by accident, without any intention to rob. But that is not the fact, as sworn to in the evidence ; and it is sworn to in such a manner, that you cannot disbelieve it. Mr Hay tells you, that after being knocked down, the first circumstance that he recollects, was his finding him-

1808.

self moving along upon the road. Then upon recovering his senses, he found himself conveyed by the shoulders, and his head lying among thorns. He then describes the struggle; in the course of which, he positively swears that the prisoner's hand was under his great coat, and that in a short time he distinctly felt a violent pull or tug at the upper part of his breeches; after which, he felt the prisoner attempting to put his hand in his pocket. On finding himself pretty well recovered in point of strength and spirits, he then laid hold of the prisoner, and never afterwards quitted him. He swore that he felt the pull at his right side, and a very little time afterwards, the first time that he had any occasion to observe the fact, he found his seal and his chain gone. He himself did not recollect that he had missed it; but the other Mr Hay swears, that at the time the prisoner was put upon the cart, Mr John Hay exclaimed, that he had lost his seal, and he could not have missed it before. At any rate, in the confusion in which Mr John Hay must have been, both in mind and body at the time, it is natural enough that he should have forgot such a circumstance as this, and he could only swear with propriety to such facts as he recollected. But the matter is clear upon the other evidence; and it therefore appears that Mr Hay missed his chain the first moment that he looked for it. Whether this was observed by the other witnesses is of no consequence, as they might be otherways employed. But Mr James Hay is positive to the fact, and he is the more to be credited, because he is very accurate as to the other things that were looked for, which he says were not found at the time, but only when they went back to the search. Now the case just comes to be a question as to the inference which you are to draw from the evidence

1808. before you. The assault is proved with the declared intention to rob, followed out with repeated attempts to get into the pocket, and a violent pull made on the right side. How could Mr Hay know what it was made at? The chain communicates no feeling to the person, and whether the chain or the pocket was pulled upon this occasion, how is it possible to say with certainty? All that can be said is, that he felt a pull at the pocket, or near it; and the fair conclusion is, that he lost the thing the moment the pull was made. The evidence would have been more complete if the chain had been found upon the prisoner's person. There would then have been no doubt. But in the circumstances of this case, the prisoner must have been more than an idiot if he had allowed this chain to be found upon him when he had so many opportunities of disposing of it in the course of a long struggle, life against life, which he had with Mr Hay, assisted by the darkness of the night, and having before his eyes almost the certainty of apprehension. The whole case lies there, and the prisoner's guilt depends upon the conclusion you are to draw from these circumstances. For as to the other matters relative to the great coat, the bludgeon, and the cap, these are really of little consequence; the prisoner was seized upon the spot, and his person has been sufficiently identified; a pull or tug was made at Mr Hay's right side; Mr Hay missed the chain and seal of his watch, and you are to consider whether it was this pull or tug which took away the chain and seal. If you cannot connect these two circumstances together, you cannot convict the prisoner of the robbery; but, on the other hand, if you can, you must convict him, whatever became of the chain afterwards. If you have any doubt, you will

lean to the side of mercy. With regard to the other 1808. crime, it is not possible to hesitate. The form, therefore, of your verdict, if you are satisfied that the robbery was committed, should be a general verdict of guilty. But if not, and if you are satisfied that the other charge is made out, you should find not guilty of the robbery, but guilty of the violent assault, as libelled, with intention to rob. On the whole, I shall leave the matter to your own common sense, under the influence of the oaths which you have taken.

The Jury returned a verdict, finding the prisoner not guilty of the robbery, but guilty of the assault, as libelled, with an intention to rob.

The Court then pronounced sentence, ordaining the prisoner to be transported to Botany Bay for life.

Counsel for the Crown—The Lord Advocate, the Solicitor-General, and Alexander Maconochie, Esq.; Agent, Hugh Warrender, W.S. Counsel for the prisoner—James Wilson and Duncan Mathieson, Esqrs.; Agent, James M'Cook.

THE TRIAL

OF

JOHN M'INTYRE, SHOEMAKER IN EDINBURGH;
ANDREW STEWART, TAYLOR THERE; AND
ROBERT STEWART, BOOKBINDER THERE;

FOR

HOUSEBREAKING AND THEFT.

16th January 1809.

PRESENT,

LORDS JUSTICE CLERK (HOPK.)

HERMAND,

CULLEN.

1809. THE indictment charged all and each, or one or other of the prisoners, as guilty, actors, or art and part, of the crime of theft, aggravated by housebreaking. In so far as upon the night of Tuesday the 1st of November 1808, they did forcibly and feloniously break into, and enter the workshop or warehouse of Peter More, calico-glazier in Edinburgh, situated in Skinner's Close, in the parish of Tron Church, and did from thence feloniously steal, and theftuously take away nineteen pieces of white cotton cloth, each piece consisting of about from 24 to 29 yards, all the property of Samuel Somerville and Company, mer-

chants in Edinburgh; nine pieces of white calico cloth, 1809. each piece consisting of about 29 yards, the property of Archibald Gilchrist and Company, merchants in Edinburgh; two pieces of furniture prints, each piece containing about 28 yards, also the property of the said Archibald Gilchrist and Company; two green covering cloths, a black coat, a black silk vest, and a pair of black cloth breeches, a hat, and three linen shirts. At least the warehouse of Peter More was forcibly and feloniously broken into and entered, and the articles above enumerated wickedly and feloniously stolen, and theftuously taken away; and the said John M'Intyre, Andrew Stewart, and Robert Stewart, were all and each, or one or other of them, guilty of the said crime, aggravated as aforesaid, and therefore ought to be punished with the pains of law.

The prisoners having pleaded *Not Guilty*, the prosecutor proceeded to substantiate the charge by evidence.

Peter More, glazier in Edinburgh, stated, That he is in the practice of taking in goods to be glazed; for which purpose, about the end of October last, he received from Samuel Somerville and Company, 27 pieces of white calico, 3 pieces of which contained 24 yards, and the remainder 28 yards each, together with 18 pieces of white calicos from Gilchrist and Company, merchants in Edinburgh, containing about 28 yards each, and 12 pieces of printed furniture about the same length, all which were placed in his shop, in order to be dressed. On the morning of the Wednesday preceding the fast day in November 1808, he was told by one of his servants that his shop had been broken into, and on going down he found the shutter of one of the windows forced open by breaking the

1809. iron bolt. This window, as well as the door, had been properly locked and secured the preceding evening. Thirty pieces of calico were carried away, of which 19 pieces of white calico belonged to Somerville and Company; and nine of the same kind, together with two pieces of printed furniture, to Gilchrist and Company. He missed also two green cloths for covering the goods, and a black coat, silk vest, black breeches, and hat, belonging to James More, which were deposited in an open trunk in his shop. The first time he heard of these goods was on the Friday following, when a Mr Ramsay, a slater, told him he believed he would be able to discover where they were to be found, by means of a Mrs Thom, in the Cowgate, who had been asked to buy some such cloth lately. After some difficulty, Mr More found Mrs Thom, who went with him to a house in Blackfriar's Wynd, where he found, concealed in a bed, a large quantity of goods, which, upon examination, proved to be his own. These goods he immediately dispatched to the Council-Chamber by several porters, attended by one or two of the town-officers. He was examined there himself, upon which occasion he again looked particularly at the goods, and was satisfied they were his property. Certain goods were shewn him in Court, which he was certain were the same that he had deposited in his shop, and had afterwards seen in the house in Blackfriar's Wynd, having not only the marks put upon them by Somerville and Company, but likewise a private mark of his own put on when he first recognized them. Twenty five pieces were found in all, of which twenty-four were white calico, and one printed furniture.

Archibald Gilchrist, a partner of the Company of Gilchrist and Company, stated, That they have been in the


habit of employing Mr More in the glazing of calicos, and 1809. in particular that they sent him in October last, nine pieces of white calico, and two pieces of printed furniture. On seeing certain goods in Court, he stated these to be the property of Gilchrist and Company, from knowing the mark upon them, and indeed from knowing the goods.

William Gilchrist corroborated the preceding witness, except as to one piece of the goods from which the private mark had been cut off, and which he thought a little finer than the others, though the difference was scarcely perceptible.

Samuel Somerville, merchant in Edinburgh, stated, That the Company of Samuel Somerville and Company was in the habit of employing Peter More to glaze cloth, for which purpose, in October last, they sent him 27 pieces, which had their private mark upon them. He was afterwards called upon to look at some goods in the Council-Chamber, which, upon examination, he knew to be his. These goods he now identified.

Margaret M'Donald proved the fact of a house having been hired by the prisoners from her in Skinner's Close, to which the whole three occasionally resorted; and in particular she remembered of seeing the whole of the prisoners together in the house, and a quantity of goods lying on the floor of a closet adjoining to the room. The access to the house was by a passage which led to that of other families.

Ann Thom, broker, College Wynd, stated, That on

1809.  A Friday evening in November last, in the Sacrament week, Andrew Stewart, one of the prisoners, came and offered her cloth for sale, which he said was lying in a house at some distance. She accordingly accompanied him to a house in Blackfriar's wind, where she found all the prisoners together, with M'Intyre's wife and a young child. She was then told by Robert Stewart, that the cloth which he said they had taken from the calender-house belonging to Mr More, was in an adjoining apartment. The next day, betwixt three and four in the afternoon, having previously told Mr Ramsay, the slater, of her intention, she went to M'Intyre's house, where she found Robert Stewart, who again asked, if she would buy a web of cloth; M'Intyre and Andrew Stewart then proceeded with her to the house in Blackfriar's Wynd, where she saw white calicos and printed furniture lying in a heap on the ground. M'Intyre informed her, that they were divided in three shares, and having selected one piece from his own share, he sold it to her for thirteen shillings, which she paid to him. This piece she now identified. While in this room, one of the prisoners complained of a piece of the goods having been taken away, for which reason, he said Robert Stewart ought not to be again entrusted with the key. She also heard M'Intyre say, that the goods were first in his house, and express great terror until they were removed.

Janet Christie's evidence related to an application which had been made to her by Robert Stewart, to get some of the cloth made into shirts. Her daughter having undertaken to do this, was furnished with a piece of cloth, measuring 21 yards, which was cut; but before it could

be made into shirts, it was, by desire of Archibald Campbell, town-officer, taken to the Council-Chamber. This cloth she identified. 1809.

Archibald Campbell, town-officer, stated, That in consequence of information of the housebreaking, and the discovery of the goods in the house in Blackfriar's Wynd, he went thither accompanied by two constables, and seized a large quantity of goods, which he immediately sent to the Council-Chamber. He then proceeded to M'Intyre's house, where he apprehended the two Stewarts, and not suspecting M'Intyre, he dispatched him for the guard, but, on his return, he judged it proper to apprehend him also. The goods were made up into sealed parcels at the Council-Chamber.

Finlay Campbell corroborated the statement of the preceding witness.

James Hood, one of the town-officers, stated, That on searching M'Intyre's house, he found a black coat,—which he now identified.

John M'Lean stated, his having lodged with a James More, who received a trunk with clothes, which were sent, in harvest last, to Mr Peter More's where he worked. He saw James More wearing a black coat, which he afterwards saw in the Council-Chamber;—and on being shewn a black coat in Court, he swore that it was the same.

The prisoners' declarations were then read.—In their

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1809. first declarations, the two Stewarts denied the least knowledge of the circumstances proved by the evidence; but in their second declarations, they confessed, that, after concerting the housebreaking, they had forced open the shutter of one of the windows of Mr More's warehouse, and afterwards opened a back-door, through which they had carried off the goods. They deposited them in M'Intyre's house, who came out of bed to receive them, and afterwards returned with them to the warehouse, and carried off an additional quantity, which was lodged in the house in Blackfriar's Wynd, by the wives of two of the prisoners.

M'Intyre, in both his declarations, denied the least share in the crime; asserting that he was quite intoxicated during the night on which it was said to have been committed, and did not recollect whether he left his house with the Stewarts or not; but he confessed having seen several bundles of white goods laid down upon the floor of his house that night, as to which he asked the Stewarts where they had got them; and on their stating that they had taken them from More's, he answered, that he feared it would be a bad job for them.

These declarations were authenticated in the usual manner; and thus closed the evidence for the prosecution. The prisoner, M'Intyre, adduced one witness to character, and produced a certificate of his good behaviour, while a fifer in the 1st regiment of Royal Edinburgh Volunteers.

The LORD ADVOCATE then addressed the Jury for the

Crown; and Mr JAMES MONCREIFF on the part of the 1809.
prisoners.

In addressing the Jury, for the prisoners, Mr Moncreiff urged a defence in law, arising from the mode in which the crime was charged in the indictment. The minor proposition stated, that the prisoners were 'guilty actors, *or art and part,*' of the crime of theft, aggravated by housebreaking; and then proceeded to detail the whole circumstances under which the crime was said to be committed, after which followed the general clause, purporting that 'at least time and place foresaid,' the workshop or warehouse in question was feloniously broken into, from which the goods enumerated were stolen; and that the prisoners 'were guilty of the said crime aggravated as aforesaid.'

According to the former practice of our criminal law, the prosecutor was in the use of libelling the matter of his accusation much at large, with a full detail of the prisoner's concern in the story, and of the circumstances which seemed to involve him in guilt. The success of the charge depended upon his establishing this series of particulars; for if the proof ended in a different train of facts, however conclusive of the prisoner's guilt, or shewed him to have a different, though equally criminal connection with the subject of the charge, the libel was not established; and the jury had no alternative but to return a verdict in the prisoner's favour.

To correct this evil the act 1592 c. 153 was passed, which provided, that in all criminal libels it shall be a

1809. relevant charge, that the prisoners are art and part of the crimes libelled; and from the date of this act it became customary for the public prosecutor, after detailing the whole matter of his accusation in the minor proposition as formerly, to add such a general clause as the one in the above indictment, beginning with 'at least time and place foresaid,' the prisoners were guilty actors, or art and part; which clause alone enabled him to prove his charge by presumptive evidence, or by some other train of circumstances than the one related in the libel.

To this clause, in the present case, however, it was objected, that it did not charge the prisoners as guilty actors, or art and part,—a charge indispensable to the admission of indirect proof,—but simply accused them of 'the said crime, aggravated as aforesaid;' that is, theft aggravated by housebreaking, without saying a word of the charge of art and part, the very condition on which the prosecutor was entitled to the aid of presumptive evidence.


The pleadings being concluded, the Lord Justice Clerk addressed the Jury as follows:

GENTLEMEN OF THE JURY,

This is a case in which I shall detain you very shortly, and shall confine myself to those points of law which have been insisted in by the counsel for the prisoners. The crime of which these men are accused is the crime of theft, aggravated by housebreaking; which, by the law of this country, infers capital punishment. They are charged with this crime in the following manner: 'Yet

* true it is and of verity, that you the said John M'Intyre, 1809,
' Andrew Stewart, and Robert Stewart, are all and each
' of you, or one or other of you, guilty actors, or art
' and part, of the said crime, aggravated as aforesaid.'
That is the charge; not that they are guilty merely of
the crime in general, and in the specific manner detailed
in the indictment, but that they are guilty actors, or art
and part. That is the charge; and it is the charge re-
quired by the act of Parliament which has been alluded
to. That act was introduced, in order to guard against
what had been found to be an evil in the old practice of
drawing indictments, which were much more detailed for-
merly than they are now.

It was held, that if the public prosecutor did not suc-
ceed in proving the whole train of circumstances stated in
the indictment, the jury could not convict the prisoners.
This was felt to be a great evil, since, in a long and mi-
nute statement, it was very often found, that a few parti-
culars were not reached by the evidence; and therefore
the act was passed, which declared it sufficient for the
public prosecutor to set forth in his indictment, that the
pannels were guilty actors, or art and part; not tying
himself down to prove the whole specific detail of the
facts, but simply that the pannels were special actors of
the crime, or art and part; that is, accessory to it by par-
ticipating in it, or giving assistance either before or after
the commission. But there is nothing in the act which
says in what part of the indictment this charge shall be
brought forward. It is usual indeed to state it in that
part of the indictment mentioned by the prisoners' counsel;
but, if not stated in the first part, it must come in the last

1809.  part,—in the clause beginning with ‘at least.’ But if it be stated in the first part of the indictment as accompanying the direct charge, it is unnecessary to repeat it in the latter part. They are charged in direct terms with the crime of theft, aggravated by housebreaking; and, therefore, I hold that there cannot be the least doubt, that this contains a relevant charge of being the actual perpetrators, or guilty actors, or art and part.

I shall now state a few observations upon what it is in law that constitutes a charge of art and part, and on the degree and kind of evidence on which juries are entitled to find a verdict of guilty as actors, or art and part of any crime; and I shall begin with the last.

From the nature of crimes of this sort, and the secrecy with which they are generally committed, it is almost impossible to have direct evidence of the fact. It is only from collateral circumstances; from the pannel's being seen near the place; apprehended in a particular situation afterwards; from having the goods found in his possession, and from combining all these facts together, that the inference arises of his being a guilty actor, or art and part. Even in the crime which, of all others, admits most of direct evidence, a robbery against the person, where he who is robbed can generally swear to the assailant, we have yet, in some instances, found it impossible to identify the robber, although, from other circumstances, no doubt remained that he was the man. He may have disguised himself; the man, from being instantaneously knocked down, may have become insensible; and yet in such cases, upon presumptive evidence, the prisoner has

been found actually guilty. Still more must this be the 1809. case in the crime of housebreaking; for unless the prisoner be caught in the act, or impeached by his accomplices, his guilt can only be inferred from circumstances. But where it has been proved that a house has been broken, as is clearly established in the present case, with respect to the shop of Mr More; where you find persons apprehended and accused in suspicious circumstances; where you see them hiring rooms not for the purpose of habitation, and those rooms containing concealments, in which the goods are actually discovered; these are the collateral circumstances from which alone the crime can be made out.

I shall now make a few observations upon what constitutes the crime of art and part of housebreaking, as distinguished from the crime of reset of theft. No doubt it is possible that, in the present case, M'Intyre may have been guilty of receiving the goods, knowing them to be stolen, and yet not guilty of the charge of art and part of the theft; and if that be the case, he must be acquitted. The only charge against him is theft, aggravated by housebreaking, actor, or art and part.

Now, supposing M'Intyre not present with the Stewarts at the shop, where is the difference between his possession of the goods, knowing them to be stolen, and the charge of guilty as art and part? The distinction lies here; that a person only guilty of receiving the goods knowing them to be stolen, can have no participation in the actual crime, which must have been committed by the actors without his knowledge. Their guilt must be complete before his can begin. They steal the goods; he


1809. receives them, knowing them to be stolen ; and that is his first connection either with the crime or the goods.

On the other hand, if a person is privy to the crime, or is in the knowledge that it is to be committed, or has concerted the commission of it ; if he stands by to give others assistance, or to warn them of danger, or remains at home to receive the goods ; all this amounts to the guilt of an accessory, or art and part of the theft, or the housebreaking, because he is a participator in the concoction of the crime, and even in the commission of it. A person standing guard while the crime is committed by others, giving them notice to escape, having the goods handed over to him, or interfering with them in any way, directly or indirectly, is guilty of the charge of art and part. Now what is the case of M'Intyre ? He shares in the crime as it goes along ; he is taking part with the criminals, and receiving a portion of the goods ; not by purchase—not in a friendly manner to conceal the theft, but as one thief receives his share of the common booty. A man is guilty art and part of housebreaking, even though he did not enter the house himself. I am sure we must all know cases of this sort. I remember one in which I was very early counsel for two people of the name of Gordon, as to one of whom the only evidence was, that he stood at a window seeing the other break into a house, and aiding him with his presence ; from which alone his guilt was inferred. Can there be any doubt, indeed, that where the accession to a robbery constitutes a person guilty, art and part, a person is so who receives a share of the common booty ? and *multo majus*, if it be true that he was privy to the original contrivance of the crime, or after-

wards assisted the thieves to dispose of the remainder of 1809. the goods. One man breaks open and enters a house; another, taking advantage of his forcible entry, goes in also and carries off goods—there can be no doubt that they are both equally guilty of the housebreaking. If one man knocks another down while a third stands by and picks his pocket, it may just as well be argued, that he is not guilty of the robbery.

With regard to the evidence of the fact of the house-breaking, there is no doubt of More's shop having been broken into; no doubt that the goods were stolen, since they have been identified in a more complete manner than I ever knew, by means of the shop marks of Messrs Gilchrist and Sommerville. It is proved that goods corresponding in quantity, and bearing these private marks, were brought to Mr More, and that he saw them with these private marks. It is proved that the goods were missing; that other goods of the identical quality were found in a room previously hired by Andrew Stewart; that they were taken into the Council Chamber, sealed up, and never opened until they were brought into your presence.

As to the different degrees of accession, if there be any difference among the prisoners, it clearly appears, that a room was hired by Andrew Stewart for a fictitious purpose, which it does not appear that he ever inhabited. It was hired, however, with the knowledge and privity of all the other prisoners; for they were all in the house, although they neither slept nor ate in it, nor could have any rational purpose in being in such a place, farther

1809.  than that they meant to use it as a place of deposit for stolen goods. You have clear evidence of Andrew Stewart coming to Mrs Thom, telling her that he had goods to sell, and giving her directions where to come to look at them. She then goes to look at them, where she finds all the three pannels in the house; but it is probable that they wished to know a little more about her before they shewed her the goods, for that night no goods were bought. She makes no objection, however, to purchase them; from which they conclude that she is a broker of the description they want. Next day she goes back and finds all the three pannels, and is shewn the goods divided into three parcels or shares. None of them is stated to be the thief, no distinction is made as to the receiver; all the fruits of the crime are shared in one booty. She is asked by M'Intyre if she would buy part of his share; and he sold her one piece out of the parcel. Thus, then, are all the three equally concerned, collected into this room, all sharing in the plunder, each claiming his own share, and even acting upon his share; and you have seen them with the characteristic iniquity generally found among thieves, accusing each other of stealing from their shares. Thus you have Andrew Stewart charging his brother with carrying off one of the pieces, and declaring to M'Intyre that for that reason he would no longer entrust him with the key. Afterwards you see Robert Stewart deliver one of the pieces to the woman Christie to be cut into shirts; upon one of which is found Mr Sommerville's private mark.

With regard to Andrew Stewart, it is not necessary to connect him with any particular part. He is connected

with the whole transaction. He hires the room; it is his 1809. room in which they are found, hired for the fictitious purpose of a habitation for his wife. I think if the case had stopped here, there would have been very little doubt; but, taken with the prisoners' declarations, it is as clear a case as ever came before the Court. As to the Stewarts there is no doubt;—whatever doubts might have arisen upon the evidence of Mrs Thom, or Christie, are all done away by their own confessions; declaring to you, in the clearest terms, the mode, the time, and the manner in which the crime was committed.

In considering these declarations, you will take it along with you, that the declaration of one prisoner cannot be evidence against another, or against any one but himself. Therefore you are not to look to the confessions of the Stewarts for evidence against M'Intyre. He rests upon his own declaration, where he denies any accession to the commission of the crime. He denies that he got his share of the booty, although indeed he says that he got some of it as a present; his only excuse being that he was drunk. I cannot say that you are to take his confession as evidence against him; but, as it is at least one of a very suspicious kind, it rather appears, looking at the direct and positive testimony of Mrs Thom, that the distinction betwixt him and the other prisoners is only nominal; and that to any plain man the evidence against M'Intyre is as strong as against the Stewarts.

The Jury then returned their verdict, finding all the pannels *Guilty*; who immediately received sentence of death.

1809. Counsel for the Crown—Lord Advocate (Colquhoun),
Solicitor-General (Boyle), and Alexander Maconochie,
Esq.; Agent, Hugh Warrender, W.S. Counsel for the
prisoners—James Moncreiff and Robert Bruce, Esqrs.;
Agent, John Cameron.

THE CASE

OF

HIS MAJESTY'S ADVOCATE,

AGAINST

JAMES HANNAH.

12th July 1809.

PRESENT,

LOKDS JUSTICE CLERK (HOPK.)

CRAIG,

MEADOWBANK,

ARMADALE,

CULLEN.

On the 2d May 1809, James Hannah was brought to trial before the Circuit Court of Justiciary at Glasgow, for the crime of robbery, aggravated by his being habit and repute a thief, and under sentence of banishment from the city and liberties of Glasgow. He pleaded *Not Guilty*, and was defended by counsel. The trial then proceeded, without any objection. In particular, a Jury was appointed, who took their places in the jury box, heard all the evidence, were addressed by the counsel for the prosecution and for the prisoner, and charged by the Judge. The usual appointment of the Court was then made, or-

1809. daining them to enclose, and return their verdict on the following day, when they accordingly returned into Court a verdict, unanimously finding the pannel guilty of the crimes charged. This verdict was recorded in the usual form, without objection ; and next day, the Court having proceeded to pass sentence against the pannel, his counsel stated an objection in arrest of judgment, that five of the Jury had not been sworn, which he offered to prove by the oaths of four of them then present ; and, consequently, that the verdict was not good as a ground of sentence. To this the Depute Advocate answered, That the record of Court bore that the assize were all solemnly sworn, and could not be contradicted by the testimony of the individuals of assize. The Judges present appointed four of the jurymen who were in Court to appear, and give their testimony upon the fact. Four of the jurymen were accordingly examined, and concurred in stating, that they had not been sworn upon the trial.

The Court then certified the case to the High Court of Justiciary, who, after hearing counsel, appointed the case to be stated in written informations, which having been accordingly prepared, were this day advised by their Lordships.

LORD CRAIG

Observed, that the whole proceedings of the Circuit Court were clear, and had passed without challenge ; but that when the Court were about to pronounce sentence upon an unanimous verdict, the objection was made that five of the Jury had not been sworn. The

Court then enquired into the fact by examining four
of the jurymen, not with the most distant idea of giving
any opinion that such proof could be admitted to contra-
dict the record, but simply that the fact might not stand
upon the mere assertion of the prisoners' counsel. The
question, whether parole proof could be received in op-
position to the record, his Lordship thought was not
without difficulty, though he was inclined to be of opi-
nion, that such proof could not be legally admitted, since,
if the record were to be thus redargued, the whole of our
criminal forms of proceeding must be subject to the great-
est delay, uncertainty and confusion. What evidence is
there that there was a trial at all, or an interlocutor of
relevancy, or a verdict, but this record? Suppose the
public prosecutor were to say, what it is not likely
he will say, but what he certainly may say; that no
jury had been sworn; the answer would be a sim-
ple appeal to the record, which is written down in
presence of all the parties. Corrections or interlinea-
tions may no doubt be necessary, from the record being
completed at the time; but where none such appear, it
must be supported. His Lordship was farther of opinion
that the objection came too late, since it ought to have
been stated when the jury were impannelled; upon which
ground alone his Lordship thought it ought to be repell-
ed.

LORD ARMADALE.

After giving the fullest attention to this case, I am
clearly of the opinion that has been delivered. I consider
this as a very important question, and I should dread the

1809. consequences, if such an objection were sustained. The first question before us is, Whether there is not a record? I am of opinion that there is a record. It is not a mere scroll-book, as it has been called, with the view of undervaluing its authority. I do not like innovations upon names. It is the minute-book of Court, where all the proceedings are entered as they take place. There is therefore a record, formal and regular, such as the one in use. It is no objection to this, or to any record, that there may be alterations, or even exceptionable entries in it. The law does not on that account destroy its authority; on the contrary, the consequence is the punishment of the clerk; but faith must, nevertheless, be given to what is entered upon the record. In that of this Court, alterations may naturally happen in the course of business; mistakes may be committed in many things; and may not a correction be made upon minutes taken down recently? The whole proceedings go on under the inspection of the Judge and the parties; the clerk at the same time writes the record; and I apprehend it to be clear, that whatever errors are thus committed, may be corrected in the face of the Court. This is not, in the smallest degree, destructive of the authority of the record, but rather tends to strengthen it.

There being, then, a record, let us consider what faith is due to it. I am of opinion that the greatest faith is due to it. After the proceedings of Court have been regularly entered as they occurred—taken down by the clerk in the presence of all parties, without challenge or observation—I say the record cannot be traversed. The greatest faith is due to it, especially in matters of form.

This is the very use of the proceedings, and of the effect which is given to forms, that the acts of the Court may not rest altogether upon the testimony of the Judges; who, but for the record, would be forced to observe and correct the proceedings themselves. When we look into the great authorities of our law, Lord Stair and Bankton, we find it explicitly laid down, that, in a matter of this nature, you are not entitled to gainsay the record. It must be taken as true. In points that have passed without challenge, which neither the Judge nor the counsel have noticed, the record must be evidence, not to be impeached by any other evidence whatever. Alterations may no doubt be made at the time, in matters passing under the eye of the Judge, the parties, and the public; but, after the proceedings are closed, to contradict the record would be attended with the highest danger. May not the public prosecutor, in any case, allege that the Jury has not been sworn, or that the witnesses have not been examined? In short, the objection, if sustained, must lead to consequences that would subvert the whole of our judicial proceedings. Therefore, after giving the greatest attention to this case, it appears to me, that as the doctrine of the prisoner would be attended with the most dangerous effects, so, neither by the law of this, nor of any other country which has a record, can the Court allow it to be traversed.

LORD MEADOWBANK.

This is a case of vast consequence to the law of Scotland. In every civilized country there must be a written record of the transactions and acts of Court. I consider

1509 the sword in this country as one of the principal guards
 of the freedom of the subject. The proceedings of Court
 are there entered and perfected, in the most solemn man-
 ner, under its immediate control, forming, at the same time,
 a salutary check upon the Judges, which is felt by every man
 that has any feeling at all, in fulfilling their high and impor-
 tant functions. The jurymen and clerk perform their offices
 under the sanction of an oath, and the Judges act under the
 control of the counsel and parties on both sides. Nothing
 appears to me of more admirable policy, than that every
 thing is thus done openly in the face of the public; and it
 is of the highest consequence that this sort of control
 should be powerful. The present objection, I conceive,
 would go materially to affect that control; for, if well
 founded, it perverts, it totally changes the functions of
 counsel for the prosecution, as well as for the pannel.
 Instead of forming one united check upon the whole res
 gata as it proceeds, they would be converted into a sort
 of watchmen, looking out for every little error that might
 afterwards cast the proceedings. Suppose the public pro-
 secutor, in troublesome times, were to keep in petto an
 objection which would occasion a new trial, would it be
 endured, that, after a verdict of innocence, the pannel
 should be again forced to put his life in hazard?

The objection, therefore, I consider as, from its own
 nature, an unconstitutional one. It was brought forward
 after the jury was dismissed. They were first allowed to
 take their seats; every thing went on; the trial proceed-
 ed as usual. They were then charged by the counsel for
 the pannel, knowing that there was this objection, which
 he might then state or not, as he thought proper. Is it

to be endured, that such an objection should be kept back? 1809:

Does not this pervert the very object which the constitution has in view by the whole trial? I know nothing in the country more respectable than the forms of its criminal law, and I have no idea that they are to be considered as so many pegs on which objections are to be hung, in order to void the whole proceedings afterwards. In some respects, they are no doubt defective in theory; but this is more than compensated in practice, by the perfection of their administration. I have no notion of a light or disrespectful treatment of our minutes; I look upon them, on the contrary, as highly authoritative, much to the honour of the gentlemen in succession who have carried them on, and still more to the honour of that constitution which has given rise to them. There is no record made up from adminicles which can stand in competition with the clear original notes of the proceedings, which are entered under the eye of the Judges, and the control of the counsel and parties on both sides, subject, at the same time, to constant correction from any quarter.

Nothing has been stated that carries the slightest feeling to my mind against the authority of these books. With this feeling, I certainly should have paid little regard to the objection at the time; I believe I should have repelled it, though I do not blame the Judges who certified it to this Court. I think the conduct of the five jurymen highly censurable. I doubt whether evidence could be received, or whether they could be permitted to swear *in suam turpitudinem*. I do not observe that the interlocutor is qualified; and I had a doubt whether you were not bound to presume the admissibility of these gentlemen

1609. who were examined by the Judges of the Circuit Court.
But, understanding that the evidence was admitted merely to lay the whole case before this Court, I feel myself at liberty, as there is a legal ground of discredit, to give full effect to it. I quite concur with such of your Lordships as have spoken. I think it is, at any rate, of the last consequence that such an objection should appear to have been seriously considered, in any case that may hereafter occur. It is an objection to which there is no end. It may go on *ad infinitum*. Cases may become complicated, and then the jury may be called upon to exhibit their own record. This must lead to endless examinations and inquiries. But I am clear that the record cannot be touched, except under the eye of the Court at the time. I see cases quoted from the law of England, where verdicts of juries have been amended. We have no such forms, and we startle very much at the idea of touching the verdict of a jury. I should be sorry to see these feelings relaxed, or to bear such a burden as would thus be placed upon the Judges.

LORD CULLEN concurred.



LORD JUSTICE CLERK (HOPE.)

This, I think, is altogether the most important case that ever came before the Court; because, I own I have not myself enlargement of mind enough to see all the consequences that must follow if such an objection were sustained. I have not foresight to lead me to see all those fatal consequences, but some of them I do see that must result to the lives and liberties of the people of this coun-

try, if the Court were entitled to put its hand to the re- 1809.
 cord in the manner that it is here sought. I am of opi-
 nion that this Court has a record, and that the minutes
 taken down at the time, in presence of the Judges, con-
 stitute that record. With regard to the writings or ori-
 ginal notes, which are and must be the true record, they are
 transcribed fairly, and are then called the *books of adjour-*
nal, which come afterwards to be considered as the record ;
 but it is clear, that if the original notes are not held to
 be true and authoritative, the subsequent record vanishes
 into nothing. The minutes taken down at the time have
 always been held as the record by immemorial practice ;
 and, therefore, there can be no doubt that such minutes,
 taken in this Court, or at the Circuit Court, are the
 proper record of the Court ; and I would beseech the
 public to consider, if it is not the record, what becomes
 of all the judgments of condemnation and acquittal
 which have been pronounced. Many—too many are the
 warrants of execution to which your Lordships have been
 compelled by law to put your hands. Have you any
 power to put your hands to a warrant of death without
 regard to the proceedings before you ? Have the jury a
 right to return a verdict of guilty independent of the pre-
 vious trial ? No. Their verdict is authorised by the evi-
 dence and the whole proceedings that take place. Why
 then, upon what does the verdict proceed as appearing in
 this book ? Only upon the previous proceedings which
 are there engrossed. The verdict refers back to the proof
 taken ; it refers to the interlocuter of relevancy ; to all
 objections that may be stated to the admissibility of ques-
 tions or witnesses ; the proceedings relative to all which
 are taken down by the clerk, and form the record. The

1809. verdict could not stand one second if it were not bottomed upon it. Certain parts of the record are signed by the Judge; certain parts of it are signed by the pannel; by immemorial custom certain parts are signed by the prosecutor; and, by custom equally immemorial, and equally sacred, certain other parts are signed by the clerk alone. The whole is taken down by him. Can it be said that any one part is more sacred than another? The minutes taken down and signed by the clerk, are equally sacred as the interlocutor of relevancy signed by your Lordships in presence of the Court. The record then bears the names of the jury, who 'being all solemnly sworn,' the pannel is asked, in the *first* place, if he has any objections to any of the jurymen? If he has he states them; if not, his counsel signifies that he has not. By the same rule, however, on which your Lordships are called upon to sustain this objection, it might be said, by the pannel's counsel, that he stated a valid objection against several of the jury, although the record is silent upon the subject. I don't know why your Lordships should refuse to give effect to the one more than to the other. The Court has no recollection of either; the clerk has no recollection; and the record is either silent or in direct opposition to the assertion. After the jury are called over and sworn in without objection, it is the invariable custom, when they are in their box, to call their names over again, for the express purpose of seeing that they are all there, and that none else are there. In the present case all this was done without objection, and the record bears, 'who being all solemnly sworn.' The moment when the jurymen are all in their box is the time for this objection. The instant they have taken their places, the clerk immediately writes,

* who being all solemnly sworn.' All this being done, 1809. then, in open Court, the Judge recollecting nothing, the clerk recollecting nothing; at the distance of two days, when the Court proceeds to pass sentence, this objection is made, and proof offered; for what purpose? to inform the Judge as to that of which he recollects nothing. If it be competent to compel the Judge to establish that as a fact, for which his own recollection does not serve him, I desire to know what is to hinder your Lordships, at any distance of days or weeks, if you are not obliged to pass sentence next day, to chuse to recollect that something or other has been wrong, as appears upon the record, and then to proceed to overturn the verdict? I ask if this be a power which the people would wish to see committed to any Judges, however eminent or respectable? Could my two honourable brethren, when judgment was craved, have said to each other, five of the jury were not sworn, and therefore the trial must go for nothing? Because, if it be competent to prove this, the Court may proceed of its own authority, upon recollection of the fact. At the moment the objection is competent, because the whole proceeding is going on under the controul of the Court. The error, if discovered and stated *instantly*, may be corrected. The jurymen would be sworn upon the spot, and all would be right. But what I ask is, whether it is for us, *ex intervallo*, to correct the error by proof, or by the acknowledgment of the jury? Is it for the interest of this country that the Judges should lay their hands upon proceedings taken down without objection at the moment? I should be very sorry to see such a power in the hands of the Court; sorry to possess it, because no man can wish to possess power so liable to abuse. We may all

1809. think ourselves upright and constitutional. The best way to keep us so is to put as little power into our hands as possible. Here are five or six jurymen who are said not to have been sworn. I observe five or six witnesses were examined, and one of these may be said not to have been sworn. The objection, if sustained, would be equally fatal with the present. I observe it is not the uniform practice to take down the witnesses as they are sworn. If witnesses are adduced, and no objection made, the clerk just writes, ' Thereafter the following witnesses were adduced ;' that is. legally adduced. What better evidence can you have of the jury having been sworn, than that the clerk has entered the fact upon the record ? It never has been the practice to make the jury sign an oath ; and the only evidence of their having been legally sworn, is, that the clerk has so taken it down ; for otherwise there is no evidence of the fact, and there never was a legal trial. In the same way with the witnesses, no man ever signs the oath ; he signs the deposition, but the oath itself stands upon the record as taken down by the clerk. Where is this to end ? For, though the record bears what is there taken down, what evidence is there that the jury were in fact afterwards sworn. We have not even yet legal evidence of it. My Lord Craig, or my Lord Armadale may remember it, but I cannot ; I have no evidence whatever that the jury were sworn. I think it would be dangerous indeed, and fatal in the highest degree to the liberties of the people, if, after the proceedings are duly entered by the clerk, in presence of the Court, the public, and the parties, any Judges could, *ex intervallo*, lay their hands upon the record. If they can alter it the one day in favour of the prisoner, they may

alter it against him the next. I think these jurymen 1909.
have much to answer for indeed, for presuming to exer-
cise that sacred function, in a question of life and death,
if they had even a doubt as to whether they had receiv-
ed it under the sanction of an oath.

The Court repelled the objection.

Counsel for the Crown—The Lord Advocate, Solicitor
General, and J. H. Mackenzie, Esq. Advocate; Agent,
Hugh Warrender, W. S. Counsel for the pannel—John
A. Murray, and John Wood, Esqrs. Advocates; Alexan-
der Douglas, W. S. Agent.

THE TRIAL

OF

JOHN DANDIE,

LATE PRIVATE IN THE FIFESHIRE MILITIA,

FOR THE

MURDER OF JOHN HOWIE,

MASON IN CERES.

Edinburgh, January 11, 1810.

PRESENT,

LORDS JUSTICE CLERK (HOPE.)
ARMADALE, HERMAND.


1810. **THE** indictment stated, That upon the night of Thursday the 12th, or morning of Friday the 13th October 1809, the prisoner having been in company with the deceased John Howie, junior, mason in Ceres, within the house of James Ireland, changekeeper, at or near the South Bridge of Cupar, did accompany the said John Howie on his way home from Cupar to Ceres, by the turnpike road leading from Cupar to Colinsburgh, till they both reached a part of the said turnpike road, about

180 or 200 yards within the Pittscottie planting, where 1810.
the prisoner feloniously and barbarously attacked and
struck the said John Howie with a stick or stone, upon
the head and other parts of the body, and feloniously robbed him of about L.30 sterling, composed of guinea notes and twenty-shillings notes of the British Linen Company Bank: That Howie died in a few days in consequence of the wounds inflicted by the prisoner, who therefore ought to be punished with the pains of law.

The prisoner having pleaded *Not Guilty*, the indictment was remitted to the knowledge of an assize, and the public prosecutor proceeded to substantiate his charge by evidence.

William Morton, tenant in Ladedy, stated, That he was acquainted with the late John Howie: That on the 12th of October last, being the Cupar market day, he paid him L.32, about 12 o'clock, within the house of John Bloxom, vintner in Cupar, and the money was contained in twenty guinea notes, and eleven twenty-shillings notes, of the British Linen Company. Next morning he heard of the accident which befel Howie.

James Ireland, vintner near the South Bridge of Cupar, stated, That about seven or eight o'clock of the evening of the Cupar market day, a number of persons came into his house to drink; among them were men of the names of Duncan, Neill, Bruce, Barnet, Mitchell, Kellie, Begbie, Greenlaw, Dandie, the prisoner, and Howie, the deceased. Howie having some money to pay the witness, came into a room where he was sitting with his wife and

1810.  daughters, and taking out a bundle of notes, paid what he owed ; and after putting the bundle into his right breeches pocket, returned to the company ; he and Dandie sat beside each other ; they were neither of them drunk ; although he would have known that Howie had been drinking, yet he knew what he was about. In the course of the evening, Howie mentioned privately to the witness that he had money in his pocket ; that when he had drunk a little he was apt to saunter about some houses in the neighbourhood, and requested a bed, with the view of staying all night ; which he was told he could get. He afterwards changed his mind, however, and, betwixt two and four o'clock of the morning, the whole party left the house. Almost immediately after this, Dandie returned, and was seen standing at the door holding his hand upon his breast. When asked what he wanted, he said somebody had struck him ; and Barnet then also coming in, desired the witness's wife, who was pitying Dandie, to let him alone, for nothing ailed him. Dandie then departed, and the witness never saw him again that night ; but when he was sitting with his wife, they heard some person at the door ; and on his wife going out with a candle, this proved to be Dandie, who asked where the man was that was to stay all night ; to which his wife answered, that he knew very well the man had gone away long ago ; and shut the door.

Mrs Ireland, the wife of the preceding witness, remembered, on the evening of Cupár market, of a number of persons coming into their house to drink, among whom were those mentioned by her husband. Howie came in about six or seven o'clock, having six shillings and sixpence to

pay her husband ; came to the kitchen, where he took out 1810.
a bundle of notes, paid her the money, and put the remainder into his right breeches pocket. He then went to the company, and in a little returned to the kitchen, saying, he was not fond of the company ; he also told her, that having money on him, and being apt to saunter about some houses near the toll, when he had been drinking, he was anxious to have a bed, so as he might stay all night. Soon after this Dandie came to the kitchen, and sat down beside Howie on his right hand, and kept close by him. About three o'clock of the morning, the whole party started as one man ; just at this time, she saw Dandie standing at the door, with one hand on his breast, and the other under his chin, and complaining that somebody had struck him. He went out in about a quarter of an hour, and soon after called out from the road, to know where the man was who was to stay all night ; to which the witness answered, that he was gone a while ago.

James Burnet, private in the Fifeshire militia, was at Cupar on the market day in October last ; and early in the morning of the next day, he went to Ireland's house, where he found Howie, Dandie, Trail, Ritchie, and some others, whom he joined. Howie was sitting by the kitchen fire, and Dandie close beside him ; the others were in a different room. In about half an hour after the witness went into the house, the whole company, including himself, left it. Howie, Ritchie, and Trail, went out the road a few minutes before the rest ; Dandie and the remainder of the company soon followed. At this time the witness heard Dandie complaining of a hurt, which he said he had received from some person at the door with

1840. a stick or a stone. He went back into the house, where the company drank a bottle of ale: and in about a quarter of an hour, they all went out towards the toll on the Ceres road. He heard Dandie inquire at Mrs Ireland where the man was who was to stay all night; to which she answered, that he had gone some time ago. They then overtook Traill and Ritchie: Traill was knocking at the door of a house near the toll-bar: whereupon the toll-keeper came out and demanded what he meant: he answered very sharply; and a scuffle ensued: in which Traill received a blow with a hammer, or some other weapon, and immediately came up, saying he was murdered, as the toll-keeper had struck him with a hammer. He then heard Dandie again inquire after Howie, and some person told him, that he had gone up the road. A short time after this, one of the party said, he had been in company with Howie, that he knew he had money on him, and being afraid that Dandie meant to go after him to pick his pocket, proposed to follow them. To this they all agreed: and after they had proceeded a considerable way up the road, they heard coughing behind them; and on returning, they saw Dandie and Howie standing together arm in arm. Some of them called out to Dandie to go home, and let Howie go home by himself; to which he answered, that he would go home with him; and Howie said, he wished this man to accompany him. They then left them, and, on departing, the witness told Dandie, that if any thing happened to Howie that night they were not to be blamed. They then returned, and in their way back fell in with Traill, who had lain down in consequence of the blow from the toll-keeper. Of this he again complained, and proposed to return for the purpose of kicking up

a dust with the toll-keeper, which they declined; and 1810.
making a circuit, by leaping over some dikes, so as to
avoid the toll, they came to Cupar. He heard Dandie
say he had friends in Ceres, and this he gave as a reason
for accompanying Howie. Dandie was dressed in a short
blue coat, corduroy breeches, his trowsers were wrapped
round his body, and his coat buttoned over them to pre-
vent them being dirtied, dark blue stockings, and a plain
shirt. He was a little the worse of drink, but quite able
to walk, and knew what he was about. Howie was quite
the worse, much more so than Dandie. Upon his cross-
examination, the witness stated, that he did not know
what became of Traill after they left him; and that the
Ceres road leads so far to Dandie's father's house.

James Ritchie, son of William Ritchie, vintner in Cu-
par, was in Ireland's house on the evening of the Cupar
market day, in October last, along with the other persons
mentioned by the preceding witnesses. Howie and Dan-
die were sitting together. The witness joined another
party, and afterwards drank with them. He staid till
about two o'clock in the morning, and then went away;
but meeting with one of his acquaintances, he returned,
and found Dandie and Howie still sitting together. He
remained in the house till half past four, when they all
went away. Howie passed along the Ceres road. Traill got
into a quarrel with the toll-keeper, and received a blow
which brought him to the ground; they lifted him up;
and at this time the witness saw Dandie standing beside
Howie on the other side of the toll. Both these persons
went up the road together. Upon this Barnet proposed
to follow them, to see what Dandie was about; and the

1810. witness recollected some expressions about *spunging* made use of. They walked on pretty hard, and called out, but nobody answered. Soon after, they heard a coughing behind them; and on returning, found Dandie and Howie standing together by the side of the dike. Some of them desired Dandie to go back to Cupar; to which he answered, that he had an aunt living in Ceres, whom he wished to see, and that he would see Howie home at the same time. Barnet then desired him, if any thing happened to *the man*, not to blame them; whereupon Dandie gave a kind of an oath, indicating, as the witness supposed, that he resented the advice. The party then returned to Cupar, and in their way fell in with Traill, who said he was anxious to give the toll man a drubbing; but this they declined, and arrived in Cupar in the same way as was mentioned by the preceding witness. The witness himself had no suspicion of Dandie.

James Greenlaw was with the party in Ireland's on the 13th October. They all went out together by the toll, about three or four o'clock of the morning; a quarrel ensued between the toll-keeper and Traill, who was knocked down. Some staid to see this quarrel, others went up the road; among these were Dandie and Howie. The witness had no suspicion of Dandie's intentions; but both Ritchie and Barnet expressed their fears that Dandie was to pick Howie's pocket, and they proposed to follow them. This was agreed to, and the whole of the party except Traill, passed up the road, calling upon Dandie who made no answer. They then discovered that they had passed them, by hearing a noise; and upon returning, the

found them both standing together ; Barnet and Ritchie 1810.
called out to Dandie to take care of Howie, and not to
bring them into any scrape about him to-morrow. Dan-
die said he would go home with him though nobody went,
as he lodged with a friend of his in Ceres.

William Barnet and *David Jackson* were both working as slaters on the morning of the 13th of October, upon a house at a little distance from Cupar ; and about six in the morning, they concurred in stating, that they both saw Dandie crossing the road, and coming as it were from Cupar, upon the east road, which is the worst, and seldomest travelled. The one then remarked to the other, that there was Dandie, and that he should not be surprised if he were but newly come from the market.

Robert Dempster, slater in Cupar, left it in the morning of the 13th of October last, a few minutes past six ; about 200 yards south of Tarbet Wood, he was stopped by a man, who gave a signal to him to listen. He had three men with him, of the names of Gourley, Arthur, and Lorimer ; they all stopped, and heard some very heavy moans. On going forward they saw a considerable quantity of blood on the high road, and heard the moaning proceed distinctly from the east side of the road. Gourlay proceeded to the place from which it seemed to issue, and gave the alarm, that a man was lying almost killed. They all went to the spot, but at first none of them knew the man. He was lying in the wood, with a tree and a whin bush between him and the road, very severely wounded in the head, and a great deal of blood appearing at the place where he lay, and upon the road, but no

1810. marks of his having been dragged. The witness ran down to the sawyers who were working in the woods to let them know what had happened; two of them returned with him, and they then tied a handkerchief about his head to keep him more comfortable. By this time the witness knew him to be John Howie. He spoke and called the witness by his name, put questions to him, but talked quite incoherently. The witness asked who had hurt him; and he gave an answer quite foreign to the purpose. They proposed to send one man to Cupar for a surgeon, and another to Ceres to acquaint his friends, but they afterwards put him into a cart, and conveyed him to Ceres. During this time, the witness saw a man, whom he afterwards learnt to be Traill, come from the opposite side of the wood. The witness asked him if he was the man who had hurt Howie. He came forward, not appearing to know what had happened, went up to Howie, looked at him, asked what they were doing, and denied that he had any hand in it. He seemed to be drunk, and had the heels of his shoes down.


John Johnstone was one of the sawyers called upon by the preceding witness on the morning of the 18th of October, when a man was found hurt in Pitscottie planting. The man was lying in the inside of the planting, and at the ditch, beside a whin bush, with a severe wound on the head, beginning about the eye, and extending to the crown of the head. He was bleeding much; a great deal of blood appeared upon the road at two places; and at one place it was sprinkled into the planting, and upon the whins the whole way. Two people from Ceres searched his pockets, and found nothing but letters and papers. No

money was found, but his watch seemed to be in his fob, 1810.
from the leather hanging down. He was asked if he
knew who had hurt him; to which he answered, that he
did not. During this time, a man, whom he since knew
to be Traill, came from the opposite side of the wood, at
about a stone-cast distance from the place where Howie
was found. One of them challenged him as the guilty
person, and he answered—"D——d cares, he's cheap o'd,
I ken wha did it." He came close up and looked at
Howie; he had been in drink, had the heels of his shoes
down, and was trembling with cold. He did not stay
long, but went away with some of the slaters. He did
not appear agitated, and had been sleeping, as he said.
He spoke very stupidly, like a man recovering from the
effects of drink.

Alexander Walker, sheriff-officer, had occasion to leave
Cupar very early on the morning of the 13th, just as the
five o'clock bell was ringing. At this time he met Ritchie,
Greenlaw, Barnet, Begbie, and Kellie coming to Cupar.
He passed them, and going forward, overtook Traill,
with whom he had some conversation, but who appeared
to be drunk, and unable to walk. He complained of the
narrowness of his shoes, and stopped, as the witness sup-
posed, to take down the heels. The witness proceeded
forward, and never saw him again. He passed Pitscottie
planting, heard no groans nor noise, nor said any thing.
He stated himself to be a little deaf.

Alexander Traill, farmer in Drumhead, was at Cupar
at the October market day, during which he was in va-
rious public-houses there. He went to Ireland's either late

1810. that night, or early next morning. He went to the kitchen and asked for a bottle of beer, was not certain whether Howie was there at the time or not, but is sure he came in soon after. Others were there, Ritchie, Barnett, Kellie, Dandie, &c. The witness joined the company; while he was in the kitchen, Howie was there. He had no conversation with him, was not told he had money; never heard any person speak of his having money, nor knew of such a thing. He drank no more in the kitchen than two bottles of ale. He had drank a good deal before, and indeed had been drinking all day. In a short time he went to another house, and then returned to Ireland's, or at least came to the door. He then returned with others of the party to the toll, and they gathered all together. Howie and Dandie both went through the toll. The others shook the toll and made a noise, upon which the toll-keeper came out, and had some words, which afterwards led to blows. The toll-keeper struck the witness a good blow on the cheek, and knocked him down. His companions lifted him up, and he sat down again at that place, where he remained a good while, feeling himself much hurt; after this he never saw Dandie, nor did he see Howie till he saw him lying in the planting. He did not know what road Howie took, nor never attempted to follow him, nor mentioned his name that night. He lay a considerable time at the toll, and went up the road with Alexander Walker, a preceding witness, without making the least noise, or conversing with any other person. After leaving Walker, happening to have on a pair of shoes which he felt pinching him, he sat down to rest at the edge of the plantation, where he fell asleep, and slept until after the sun had risen, when he

was awakened by a noise which he heard at some distance 1810.
about a man. He immediately went forward, and saw 
Robert Nicholson, whom he knew. They all called out,
'There's a man coming out of the plantation, that's
Traill, that's the man.' The witness asked what was the
matter, went up immediately, and recognized Howie, but
did not recollect saying he knew who had committed the
deed; neither had he any knowledge or suspicion of the
person. All he thought was, that having been all in com-
pany the preceding night, they might have quarrelled and
beat him. A strong dew had fallen during the night, and
he trembled from the cold. He told the men he had been
in company with Howie that morning. He afterwards
proceeded to his own house, to which the Ceres road
leads, and was taken out of his bed in the course of the
morning, by order of the Sheriff, to be examined. He
put on all the clothes he had just put off, except the
coat, and put the whole money in his pocket, which he
had there the preceding day.

Jean Gourlay went from Ceres to Cupar on the morning
of the 13th, and found John Howie lying wounded in
Pitscottie wood. His pockets were searched, and a half-
penny and two bits of paper were all that was found, ex-
cepting his watch, which was in the fob, he knew her,
and seemed sensible; she asked who had hurt him, and
- he answered he could not tell. He was taken to his fa-
ther's house.

James Dempster, surgeon in Cupar, proved that the
wounds were the cause of Howie's death, who was so in-
sensible, that to the witness he never spoke but incohe-

1810. otherwise. He had his finger cut, which was bleeding at the time.

James Henderson, serjeant in the Fifeshire Militia, stated, That he never gave Dandie leave of absence, on the 12th or 13th of October, nor sent him with a letter to his (witness's) father. Dandie was not at parade on the 13th. His mother came and said he was unable to attend that day, and asked the witness to excuse him, which he refused.

William Henderson and *James Lowden*, sheriff-officers, proved, That at the time of making his declarations, Dandie produced a piece of corduroy, which he said was marked with Spanish brown, but which appeared to the witness to have been recently put on, as Dandie rubbed off some of it with his hand. They stated that his father is a wright, that he was bred a wright, and that wrights are in the habit of using Spanish brown.

The prisoner's declarations were then read, in which he made numerous assertions, directly contrary to the evidence. In particular, to account for his absence from parade on the 13th, he stated that serjeant Henderson had given him leave of absence, which he was induced to do by the prisoner having formerly carried a letter from the serjeant to his father.

The prisoner only adduced one exculpatory evidence, *James Toddy*, of the Fifeshire militia, who proved that his finger was cut and bleeding on the 12th of October, and that his general character was that of a quiet, sober lad.


Here the evidence closed, and the Jury were charged ^{1810.}
by the LORD ADVOCATE for the Crown, and by JOHN HART,
Esq. Advocate, for the prisoner.

The LORD JUSTICE CLERK then addressed the Jury as follows.

GENTLEMEN OF THE JURY,


It is now my province, between the opposite statements, which you have just heard, to endeavour to point out such circumstances, appearing from the evidence, as may lead to a just conclusion. At the same time, I am well aware that most of you are just as well able to distinguish, and to judge of those circumstances, as I am ; and I shall therefore endeavour to compress what I have to say within as short a compass as possible. And, in the first place, in justice, if I may use the expression, to the justice of the country, I must begin with saying a few words upon the appeal which was made to your feelings by the prisoner, in regard to his situation and the conduct of his defence ; it being only last night, as was said, that his counsel knew any thing of the case. I hope you all know, that there is no man in this country, let him be the meanest, the poorest, and the most obscure, who need stand in that situation ; because I will venture to say, that there is no criminal, who, after his commitment, does not know, and is not told by numerous persons, that he has nothing to do but apply by petition to this Court, who will assign counsel and agent for him, and they are bound to conduct his defence.

Another circumstance was stated, that his counsel, con-

1810.  trary to all his former practice, had been denied a sight of the precognition. What this practice may have been, or what instances of indulgence may have been experienced in the course of it, it becomes not me to dispute; but this I know, that it never was my practice, while I held the office of his Majesty's Advocate, to show the precognition to any person, except the various magistrates, my own deputies, and the other official people; and I believe it never was the practice of any former Lord Advocate. I conceive the law to be, that the precognition is sacred, to be seen by none but the Crown counsel; and as for the practice that is spoken of, it must have been a matter of mere personal indulgence.

Having stated thus much upon the complaint that has been made of hardship by the prisoner, I think it necessary, before saying any thing upon the particular circumstances of the case, to make a few remarks upon the general nature of the evidence, which is, not the direct statements of those who swear that they saw the crime committed, but consists of reasoning from a long chain of circumstances.

The distinction between direct and indirect evidence was well stated by the counsel for the prisoner; and I perfectly agree with it, except in one particular, where I think he carried his argument too far. In stating the nature of circumstantial evidence, he observed, that the result of it must be so strong as to exclude the possibility of any other person but the prisoner having committed the crime. But, if this be true, it would overthrow the certainty of all evidence, even the most direct; since,

though a hundred people were to swear that they saw 1810.
the crime committed, there is still a possibility that they 
may be all perjured, and therefore it never can be demanded of circumstantial evidence, or of any evidence, that it shall exclude the possibility of all suppositions but one; it is only necessary to create such a degree of reasonable conviction as may satisfy the minds of the jury, though by no means exclude the possibility of the fact being otherwise. All may be true that the witnesses have sworn, and yet, by possibility, this man may be innocent; and so it would be, though every one of them had stated that they saw him murder the deceased.

That being the case, let us consider the amount of the evidence that has been laid before us. That Howie, the deceased, was murdered and robbed, is a fact which it is utterly impossible to dispute. Of that there can be no doubt. And the question comes to be, Who committed the crime? But, before proceeding to inquire whether it was the prisoner or not, it is proper to consider whether there is any evidence or probability, or even possibility, that any of the others, and especially Traill, was the guilty person. Traill was found in such suspicious circumstances, that the persons who discovered the body charged him with the murder at once; and it was natural to do so, because they saw him coming out of the wood,—a most suspicious circumstance clearly, and not less so on account of his being drunk; insomuch, that I think it must have gone hard with Traill, if he had not been able most sufficiently to account for every moment of his time. I think it could hardly be him by possibility. And let us examine the evidence on this point.


1810. The whole party left Ireland's nearly at the same moment, and they all met again at the toll-bar; Barnet, Ritchie, Howie, Traill, Dandie, and some others. They were all in a body about the toll-bar; and there Traill met with a very severe accident, which brought him to the ground. They left him sitting there; and some suspicions being expressed, that Dandie had bad intentions with regard to Howie, it was agreed to follow them; and accordingly, they all followed Dandie and Howie up the hill, leaving Traill so sitting disabled upon the ground. What follows? Traill never joins them, nor follows them. They go on to the interview which they had with Dandie and Howie. They then came back, and found Traill where they had left him. And what was brooding in his mind? Not Howie, but the blow which he had got from the toll-keeper, and he proposed to go back for the purpose of being revenged. They refused, and returned home; and this took place exactly as the Cupar bell was ringing five. Then turn to the evidence of Walker. He goes out of Cupar just about the same time, or within a few minutes after. He meets the others returning to Cupar, and he finds Traill in the very same situation in which they had left him; he enters into conversation with him; he is accompanied up the hill so far by Traill, who, he says, seemed to be exceedingly drunk, and then sat down to alter or mend something about his shoes. This must have been about a quarter past five. Walker goes on, leaving Traill a long way short of the place where Howie was found, and he proceeds, seeing none of the three; so that Howie must have been disposed of before Walker parted with Traill, and the person must have made his escape. Traill then, according

to his own account, went into the wood, fell asleep, and 1810.
wakening on hearing the noise, stumbled on the murder-
ed man and the party who had found him; but that he
committed the crime is impossible. The man must have
been murdered before he came up. Walker indeed says,
that he heard no groans; but Howie may not have suffi-
ciently recovered at that time to be able to utter a groan.
Besides, he said he was deaf, and consequently may not
have heard groans though they were uttered; at any rate,
he passed on, saw nothing, and dreamed of nothing. If
he had seen Howie still alive, it could have been argued,
that Traill might have passed up the hill and murdered
him, after Walker was out of sight. But Howie was not
seen, and therefore there is not now the smallest doubt
that he is not guilty of the murder.

Another circumstance, corroborative of the account he
gives of himself, is, that he says he had on a pair of tight
shoes, and stopped to take them down in the heel, and
down in the heel they are found. Traill was not in a
state fit to quarrel. He said, to be sure, that he knew
who did the deed; and he explained this, by saying, that
he thought the whole party had had a fight. Traill did
not know that he was robbed, nor probably that he was
seriously hurt. Perhaps none of them suspected that he
was murdered, but believed that he had been beat in a
quarrel with his companions. Then let us come to the
rest of the case. That it could have been any of the
other men is physically impossible, because they returned
to Cupar, by Dandie's own account. They left him and
Howie together; and he does not deny this in his decla-
ration. They went away down the hill, and were seen

1810. returning to Cupar as the bell rung five. That they are guilty is impossible. Why then, is it the prisoner? Here you must go back to Ireland's house; and, from the moment that they left it, there are most strong and fatal circumstances of suspicion against him. In the first place, after the party had left Ireland's, he lingered behind upon a feigned cause. There is no evidence whatever that any body struck him. He himself, indeed, in his declaration, tells a story of a long fight, of which there is not only no evidence, but which is disproved by Ireland and his wife, who swear, that there was no noise, fighting, nor riot, nor no quarrel; and, as there was no quarrel, who should strike him, or why should any body strike him? The probability is, that he staid behind upon this pretence, thinking that Howie had not left the house.; but, be that as it may, what happens? Dandie comes back; they leave the house together; and Ireland's wife positively swears, that in a little she saw and heard his voice at the door, demanding, where is the man who is to stop in the house all night? What business, what concern had he whether Howie was to stop in the house, or where he was to stop.

There is no evidence that they were relations, indeed they were hardly acquainted. It is not true that Howie lodged in a relation of the prisoner's at Ceres. What business had he to enquire, or be informed upon the subject. Mrs Ireland told him, that he knew the man was already gone; upon which he immediately goes away. And where does he go? He follows directly. Does he go home? Does he go to his father's house? No. He remains about the toll bar, and he, of all the party, is the only

one who attaches himself to Howie. The others remain 1810. on the other side of the toll, but he goes forward. Then  what happens? Had he any business at Ceres? Any relation there? None. Was it there that Howie lodged with a relation of his? Not true. But he goes away with Howie by himself, not knowing that the others followed him, for they remained behind a little. But they had seen Dandie go away with Howie, and knowing that it was not his road home, this struck them as a suspicious circumstance. One of them, either Barnet or Ritchie, but no matter which, since it is plain that there was among them a conviction, that the prisoner was to rob, or, as they call it, to *sponge* Howie:—one of them proposed to follow him on that account, and accordingly they all went after him, and they overtook him, and passed him on the road; and it is not clear to me, that the blow was not given by that time. Hearing one of them cough, however, they returned, found the prisoner and Howie standing together, and then what takes place? The circumstances, I confess, are so strong as almost to turn the other way, and to be in favour of the pannel, for they gave him a solemn warning desiring him to come away home. But no! Strange to tell! he persists in going home with Howie. He said he would go home with him; and gives for a reason the false statement, that he had a relation in Ceres with whom Howie lodged. They repeat their warning, even in a more solemn manner; and I own, that to suppose that a man so warned, caught in the fact almost, or at least the very instant before the fact, should yet have the courage to persist in spite of such circumstances, is almost incredible. But, alas! what I suspect is, that the crime had been then more than half committed; and that blinded by his fears,

1810. and not seeing the consequence of what he was bringing on himself, he did not quit Howie. But, says the prisoner, I shook myself loose of Howie, I followed my companions within sight, so as to distinguish them, and when they went through the toll bar, I struck across by another way, and went home as the bell rung five. That is the story he tells you.

Now, if it were true, is it not remarkable, that if, after the warning given him, after the suspicions which he saw them entertain, he followed them so close upon the heels as to know them, he should never have called out to them, and said here I am, I have shaken myself loose of Howie, you see your suspicions are unfounded. It is almost incredible that he should not have done so; but he does no such thing; he says, however, that he took a nearer way to his father's house, which he reached just as the bell rang five; and even says that he went immediately to bed. Is that true? It is not—not one word of it: For instead of going to his father's by the road which comes down from Ceres, he is seen by the slaters upon the road betwixt the toll bar and Cupar; and in place of having crossed the road, he is seen passing through the little common, the back way to his father's house, going in the very opposite direction from what he would have done if he had come from the Ceres road.

Without going further, these are most dreadful circumstances. A man robbed and murdered, and the person last seen in his company—traced to his company—almost to the very instant when the fact must have been committed. Not only was the prisoner the last man in his

company, but he can give no account of himself but a false account. Even the story that he had gone straight home is not true. It cannot be true. Had it been earlier in the season, when there is more day light, it is possible that there might have been some mistake. But five is at least a quarter before sun-rise. Six o'clock is the very soonest that tradesmen go to work, so that there can be no mistake. 1810.

These are circumstances of strong and grievous suspicion, indeed, not perhaps exclusive of the possibility that some other person may have been guilty, but not enabling me to believe that this man is innocent. When examined upon the matter before the Sheriff, he emitted various declarations. I have noted these declarations till I am tired, page after page, where he tells the most positive and palpable falsehoods. The whole story of his having gone home to his father's house by crossing the Ceres road, not one word of it is true. The slaters saw him coming as it were from Cupar, and they believed him to be just coming from the market. Then he accounts for his not being at the parade next day, by saying that he had got leave of absence; another gross falsehood. But suppose he had been mistaken in this, he assigns a reason for getting leave from serjeant Henderson, as to which he could be in no mistake, namely, that he had formerly carried a letter from the serjeant to his father. Serjeant Henderson swears that he never gave him any such letter; and that the leave was not given him upon the day in question, the prisoner himself states; for he says that he had got it on the Tuesday, for the Wednesday and the

1810. Thursday. Could the serjeant be mistaken? Is it possible to imagine it? It is utterly impossible.

In short, all these circumstances are circumstances of most grievous suspicion, which, I confess, I cannot lay out of my view. I cannot reconcile it to my mind that this man is innocent. At the same time it is my duty to tell you, that there are other circumstances that weigh in his favour. First, it is a very strong circumstance that Howie, who was stupified and drowsy, but not insensible when he was roused, upon being deliberately asked who did the deed; answered, he did not know; and when asked if Dandie did it, said he did not know Dandie. That is possible; but the extraordinary thing is, that if it was Dandie who knocked him down, he should have forgot all the circumstances attending it. The only way of accounting for it is, that he was so beastly drunk as to be unable to distinguish, or recollect any thing; and yet that is far from the state in which he is described by the witnesses; for Ireland swears, that, though Howie had been drinking, he did not think him drunk. Whether going out to the air had increased the effects of the drink to such a degree as to render him unconscious of who it was that murdered him, may be a question; but certainly Ireland does say, that though he could know he had been drinking, he was not drunk. Secondly, there is another very material circumstance; for most undoubtedly what would have been conclusive against the prisoner on the one hand, ought to make for him on the other, when the fact is different. If, when asked who murdered him, Howie had said that it was one of the people

that were with him in Ireland's, that would have been 1810. conclusive against the prisoner; and, on the other hand, when he says that he did not know who it was, and did not know Dandie; and, if it is at least doubtful whether Howie was so drunk as to be incapable of recollection, these are circumstances that weigh very strongly in his favour.

There is another circumstance brought in evidence against him which struck me as much in his favour, if he had not disclaimed it by his declaration; and that is, his mother sending for the girl Blyth to help her to wash. That shews no suspicion in the people of the house; for certainly they would not have sent for assistance if there had been blood to wash out of clothes. The very slight drop of blood upon the ruffle of his shirt may be accounted for from the cut finger. That is an immaterial circumstance, and it is treated as a joke both by himself and the girl. But these things which would have been in his favour, he chuses utterly to deny; positively declaring, that he had gone out long before the girl Blyth came in, or that she made any remarks to him whatever. Still however the circumstance remains, that the family had no belief that there was any thing wrong, otherwise they never would have sent for assistance to help them in washing.

Another circumstance operates in his favour; that having got his pantaloons dirtied, he sits down openly, before the girl Blyth, to pipe-clay them. It is said that he had washed the breeches in secret; why then did he not clean the pantaloons in secret? But with regard to the breeches

1810. there are very strong suspicions indeed, arising from his own declaration. Instead of openly acknowledging that he had on these breeches, and as to the blood, saying that it must have been blood from his finger, he positively denies that he had them on for fourteen days; and yet they are found wet at the knees,—the very place where those marks are which the witnesses took to be blood. This is rendered more suspicious from his own declaration, which, if it be true, would have made it impossible that the breeches could have been wet; for if, as he says, they had remained so long in his bed, nothing that could have been called blood could have been squeezed out of them, since, in that time, whatever it was, it would have become hardened. They may have been recently touched, recently wetted, whether from any struggle from the parties having been down, and his knees wet with the dew, or from attempting to wash them afterwards when he came home, cannot now be known. But so it is; there they appear in such a state as rendered it possible for Dr Dempster to squeeze out a drop of what, from the taste and smell, he believed to be blood.

Such are the leading circumstances of the case. It is a case which will require your full and cautious consideration. But remember, that, in cases of difficulty, you are not to form your opinion one way or another merely because it may require time and reflection to form a just opinion. You are to weigh the whole circumstances coolly, deliberately, and maturely; and, if the tendency of all the evidence produces in your minds, notwithstanding other circumstances that are favourable, a firm conviction that this man is guilty, that verdict you will re-

turn. But, on the other hand, if the proof is not satisfactory, it is your duty to lean to the side of mercy. You will either find not guilty or not proven, as it may appear proper to you. I freely confess to you, my impression is, that he is guilty. 1810.

The Jury were then enclosed, and next day returned a verdict, finding, by a plurality of votes, the libel *Not Proven*.

The pannel was afterwards assoilzied simpliciter, and dismissed from the bar.

Counsel for the Crown—Lord Advocate (Colquhoun), Solicitor-General (Boyle), and Alexander Maconochie, Esq.; Agent, Hugh Warrender, W. S. Counsel for the prisoner—John Hagart, Esq.; Agent

October 1812.

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By JOHN PHILIP WOOD, Esq.

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 “ arduous a task,—if these have any merit, or deserve the favour of
 “ the public, the Author flatters himself this Work, on perusal, will not
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DUKE OF ROTHSAY.

Hamilton, Earl of Abercorn	Stewart, Lord Avandale
Sandilands, Lord Abercrombie	Cumyn, Lord Badenach
Gordon, Earl of Aberdeen	Lindsay, Earl of Balcarres
Gordon, Viscount of Aboyne	Balfour, Lord Balfour of Burleigh
Gordon, Earl of Aboyne	Elphinston, Lord Balmerinloch
Ogilvy, Earl of Airly	Ogilvy, Lord Banff
Graham, Earl of Airth	Hamilton, Lord Bargeny
Stewart, Duke of Albany	Barret, Lord Barret of Newburgh
Kent, Lord Aitrie	Douglas, Viscount of Belhaven
Douglas, Earl of Angus	Hamilton, Lord Belhaven
Stewart, Earl of Angus	Bellenden, Lord Bellenden
Murray, Earl of Annandale	Stuart, Lord Blantyre
Johnstone, Marquis of Annandale	Borthwick, Lord Borthwick
Arbuthnott, Viscount of Arbuthnott	Moray, Lord of Bothwell
Campbell, Duke of Argyle	Ramsay, Lord of Bothwell
Boyd, Earl of Arran	Hepburn, Earl of Bothwell
Stewart, Earl of Arran	Stewart, Earl of Bothwell
Aston, Lord Aston of Forfar	Campbell, Earl of Breadalbane
Campbell, Earl of Atholl	Brechin, Lord of Brechin
Douglas, Earl of Atholl	Barclay, Lord of Brechin
Stewart, Earl of Atholl	Scott, Duke of Buccleugh and Queens- berry
Stewart, (Lord Lorn and Innermeath), Earl of Atholl	Earl of Buchan
Murray, Duke of Atholl	Cumyn, Earl of Buchan

Stewart, Earl of Buchan
Douglas, Earl of Buchan
Erskine, Earl of Buchan
Erskine (Lord Cardross), Earl of Buchan
Wemyss, Lord Burntisland
Stewart, Earl of Bute
Stewart, Earl of Caithness
Crichton, Earl of Caithness
Sinclair, Earl of Caithness
Livingston, Earl of Calendar
Carlyle, Lord Carlyle
Dalzel, Earl of Carnwath
Bruce, Earl of Carrick
Stewart, Earl of Carrick
Stewart, Earl of Carrick in Orkney
Kennedy, Earl of Cassillis
Cathcart, Lord Cathcart
Churchill, Lord Churchill of Aymouth
Colvill, Lord Colvill of Culross
Colvill, Lord Colvill of Ochiltree
Elphinstone, Lord Coupar
Richardson, Lord Cramond
Cranstoun, Lord Cranstoun
Crawford, Lord Crawford
Lindsay, Earl of Crawford
Lindsay, Earl of Crawford and Lindsay
Mackenzie, Earl of Cromarty
Ramsay, Earl of Dalhousie
Scott, Earl of Delorain
Dennistoun, Lord Dennistoun
Keith, Lord Dingwall
Preston, Lord Dingwall
Maxwell, Earl of Dirletoun
Douglas, Duke of Douglas
Sutherland, Lord Duffus
Crichton, Earl of Dumfries
Home, Earl of Dunbar
Constable, Viscount of Dunbar
Douglas, Earl of Dunbarton
Osborne, Viscount of Dunblane
Scrimgeour, Earl of Dundee
Graham, Viscount of Dundee
Cochrane, Earl of Dundonald
Seton, Earl of Dunfermline
Galloway, Lord Dunkeld
Murray, Earl of Dunmore
Murray and Talmash, Earl of Dysart
Montgomery, Earl of Eglintoun
Bruce, Earl of Elgin and Kincardine
Murray, Lord Elibank
Elphinston, Lord Elphinston
Hay, Earl of Errol
King, Lord Eythin
Fairfax, Lord Fairfax of Cameron
Cary, Viscount of Falkland
Macduff, Earl of Fife
Ogilvy, Earl of Findlater and Seafield
Forbes, Lord Forbes
Douglas, Earl of Forfar
Forrester, Lord Forrester
Ruthven, Earl of Forth
Fraser, Lord Fraser
Crichton, Viscount of Frendraught
Lord of Galloway

Stewart, Earl of Galloway
Abercromby, Lord Glasford
Boyle, Earl of Glasgow
Cunningham, Earl of Glencairn
Gordon, Duke of Gordon
Ruthven, Earl of Gowrie
Gray, Lord Gray
Ramsay, Viscount of Haddington
Hamilton, Earl of Haddington
Halyburton, Lord Halyburton of Dirleton
Hamilton, Duke of Hamilton
Herries, Lord Herries
Bothwell, Lord Holyroodhouse
Home, Earl of Home
Hope, Earl of Hoptoun
Carmichael, Earl of Hyndford
Campbell, Earl of Irvine
Ingram, Viscount of Irvine
Macdonald, Lord of the Isles
Erskine, Earl of Kellie
Gordon, Viscount of Kenmure
Boyd, Earl of Kilmarnock
Livingston, Viscount of Kilsyth
Seton, Viscount of Kingston
Kinnaird, Lord Kinnaird
Hay, Earl of Kinnoul
Keith Falconer, Earl of Kintor
Macellan, Lord Kircudbright
Maitland, Earl of Lauderdale
Lennox, Earl of Lennox
Stewart, Duke of Lennox
Lennox, Duke of Lennox and Richmond
Melville Leslie, Earl of Loven and Melville
Leslie, Lord Lindores
Livingston, Earl of Linlithgow
Kerr, Marquis of Lothian
Campbell, Earl of Loudoun
Fraser, Lord Lovat
Lyle, Lord Lyle
Macdonell, Lord Macdonell and Arrass
Dunbar, Earl of Dunbar and March
Home, Earl of Marchmont
Keith, Earl Marischal
Marr, Earl of Marr
Erskine, Earl of Marr
Drummond, Earl of Melfort
Gordon, Viscount of Melgum
Menteth, Earl of Menteth
Graham, Earl of Menteth
Middleton, Earl of Middleton
Graham, Duke of Montrose
Monypenny, Lord Monypenny
Randolph, Earl of Moray
Dunbar, Earl of Moray
Stewart, Earl of Moray
Douglas, Lord Mordingtoun
Douglas, Earl of Morton
Nairn, Lord Nairn
Napier, Lord Napier
Leslie, Lord Newark
Livingston, Earl of Newburgh
Cheyne, Viscount of Newhaven
Maxwell, Earl of Nithsdale

Carnegie, Earl of Northesk
 Stewart, Lord Ochiltree
 Oliphant, Lord Oliphant
 Sinclair, Earl of Orkney
 Hepburn, Duke of Orkney
 Stewart, Earl of Orkney
 Hamilton, Earl of Orkney
 Douglas, Earl of Ormond
 Stewart, Marquis of Ormond
 McGill, Viscount of Oxford
 Valoniis, Lord of Panmure
 Maule, Earl of Panmure
 Drummond, Earl of Perth
 Forbes, Lord Forbes of Pitsligo
 Stewart, Lord Pittenweem
 Colyear, Earl of Portmore
 Graham, Viscount of Preston
 Douglas, Marquis of Queensberry
 Mackeay, Lord Reay
 Rollo, Lord Rollo
 Primrose, Earl of Roseberry
 Ross, Earl of Ross
 Stewart, Duke of Ross
 Ross, Lord Ross
 Leslie, Earl of Rothes
 Ker, Duke of Roxburghe
 Hamilton, Earl of Ruglen
 Rutherford, Lord Rutherford
 Ruthven, Lord Ruthven
 Stewart, Lord Saint Colme

Abernethy, Lord Abernethy of Salton
 Fraser, Lord Salton
 Grant, Earl of Seafield
 Mackenzie, Earl of Seaforth
 Douglas, Earl of Selkirk
 Sempill, Lord Sempill
 Sinclair, Lord Sinclair
 Somerville, Lord Somerville
 Carnegy, Earl of Southesk
 Lindsay, Lord Spynie
 Dalrymple, Earl of Stair
 Alexander, Earl of Stirling
 Murray, Viscount of Stormont
 Drummond, Viscount of Strathallan
 Earl of Strathern
 Stewart, Earl of Strathern
 Lyon, Earl of Strathmore and Kinghorn
 Sutherland, Earl of Sutherland
 Scot, Earl of Tarras
 Rutherford, Earl of Teviot
 Spencer, Viscount of Teviot
 Livingston, Viscount of Teviot
 Sandilands, Lord Torphichen
 Stewart, Earl of Traquair
 Murray, Earl of Tullibardine
 Hay, Marquis of Tweeddale
 Wemyss, Earl of March and Wemyss
 Fleming, Earl of Wigton
 Seton, Earl of Wintoun
 Gifford, Lord of Yester.

An APPENDIX is subjoined, containing the creations of the Titles, arranged in chronological order, with the limitations so far as the same have been ascertained by the Editor, and other Papers relating to the Peerage.

SIR ROBERT DOUGLAS'S BARONAGE OF SCOTLAND.

The Nobility and Gentry are most respectfully informed, that at Messrs CONSTABLE and COMPANY'S, Edinburgh, and WHITE, COCHRANE, and COMPANY'S, Fleet Street, London, a few remaining Copies may be had of

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. The above Work is intended to accompany THE PEERAGE OF SCOTLAND, and contains the Genealogies of the Baronets and the lesser Barons or Landed Gentry of Scotland, including particular Pedigrees of the following Families:—

Adam of Maryburgh
Aikman of Cairny, Rosse, and Brambleton
Ainslie of Pilton, now representative of the
Ainslies of Dolphinston
Anstruther of that Ilk
Anstruther of Anstrutherfield, now of In-
verkeithing
Blair of Adamton
Blair of Ardblair
Blair of Balthvock
Blair of that ilk
Blair of Glassclune
Blair of Inchyra
Blair of Pittendriche
Boswell of Auchinleck
Boswell of Balnuto
Bruce of Blairhall
Bruce of Clackmannan

Bruce of Earlshall
Bruce of Kinross
Bruce of Kennet
Bruce of Stenhouse
Burnet of Leys
Cameron of Lochyell
Campbell of Aberuchill
Campbell of Auchinbreck
Campbell, alias Maciver of Ashnish
Charteris of Amisfield
Cheape of Rossie
Cheape of Wellfield and Strathtyrum
Clephane of Carslogie
Clerk of Listonshiels
Clerk of Pennycuik
Colquhoun of Comstroddean
Colquhoun of Kenmure
Colquhoun of Luss

BARONAGE OF SCOTLAND.

Colquhoun of Tillyquhoun	Hay of Paris
Congalton of that Ilk	Hay of Strowie
Crawfurd of Crawfurdland	Henderson of Forde
Crawfurd of Jordanhill	Home of Ninewells
Cuming of Altyr	Hope of Craighall
Cuming of Auchry	Inglis of Cramond
Cuming of Logie	Inglis of Manner and Mannerhead
Cuming of Relugas and Presley	Innes of Innermarkie, Balveny, and Or-
Cunningham of Caprington	town
Dalmahoy of that Ilk	Innes of Innes
Dempster of Muresk, Pittliver, &c.	Johnston of Caskieben, now of that Ilk
Denune of Catbole	Johnston of Wamphray
Dick of Braid	Keith of Craig
Dick of Craighouse	Keith of Ludquhairn
Dick of Grange	Keith of Pittendrum, Ravelston, &c.
Dick of Prestonfield	Kinloch
Dick, Sir John, Consul	Kinloch of Gourdie
Douglass of Glenbervie	Kinloch of Kilrie
Drummond of Hawthornden	Kinloch of that Ilk, in Perthshire
Duddingston of Sandford	Lawson of Cairnmuir
Duff, Baron of Dipple and Braco in Scot-	Leith of Bucharne
land, Earl Fife, Viscount Macduff, and	Leith of Freefield
Lord Braco of Kilbride, of the kingdom	Leith of Harthill
of Ireland	Leith of Leith-hall
Dunbar of Durn	Leith of Overhall
Dunbar of Grangehill	Leith of Freefield
Dunbar of Hemprigs	Leslie of Wardis
Dunbar of Mochrum	Lindsay of Eaglescainy
Dunbar of Westfield	Lindsay of Kirkforthar
Dundas of Arniston	Lindsay of Wolmerstoun
Dundas of Blair	Lockhart of Lee
Dundas of Dundas	Lockhart of Cleghorn
Dundas of Duddingston	Macalpine
Dundas of Manour	Macdonell of Glengary
Dundas of Newliston, of whom the Dun-	Macdonald of Kingsburrow
classes of Morton, Philpstone, and	Macdonald of Macdonald
Breastmill are descended.	Macfarlane of that Ilk
Durham of Grange	Macgregor of Macgregor
Durham of Luffness	Macguarie of Macguarie
Durham of Pitkerrow, Largo, &c.	Macguarie of Ornaig
Eccles of that Ilk and Kildonan	Macintosh of that Ilk
Farquharson of Finzean	M'Iver, alias Campbell of Ashinish
Farquharson of Invercauld	M'Kenzie of Applecross
Farquharson of Inverey	M'Kenzie of Balmaduthie
Forbes of Monymusk	M'Kenzie of Coul
Forbes of Craigievar, representative of the	M'Kenzie of Davochmaluak
House of Corse	M'Kenzie of Garloch
Foulis of Colinton	M'Kenzie of Highfield
Gibson of Durie	M'Kenzie of Hiltoun
Glendonwyn of that Ilk	M'Kenzie of Kilcoy
Gordon of Gordonstown	M'Kenzie of Ord
Gordon of Lesmair	M'Kenzie of Redcastle
Gourlay of Kincaig	M'Kenzie of Scatwell
Grant of Grant	M'Kenzie of Suddy
Haig of Bemerside	M'Lean of Coll
Halket, Craigie, of Halhill	M'Lean of Dowart and Morven
Halket of Pitsferran	M'Lean of Lochbay
Hamilton of Innerwick	Macleod of Assint, now of Geanies
Hamilton of Orbieston, Dalziel, and	M'Leod of Bernera and Muiravenside
Rosehall	M'Leod of Glishernish
Hamilton of Silvertonhill	M'Leod of Hammer
Hamilton of Udston, &c.	Macleod of Lewis
Hamilton of Wishaw	M'Leod of that Ilk
Hay of Pitfour	Macleod of Rassy

M'Leod of Tallisker	Riddle of Riddle, or of that Ilk
Macnab of that Ilk	Robertson of Inches
Macnachtane of that Ilk	Robertson of Muirton, Gladuey, &c.
Macpherson of Breakachie	Robertson of Strowan
Macpherson of Brin	Robertson of Kindace
Macpherson of Clunie	Rose of Kilraick or Kilravock
Macpherson of Dalraddie, afterwards of Inneressie	Scot of Balweary, now represented by Sir John Scot, of Ancrum
Macpherson of Essich	Scot of Burnhead
Macpherson of Inneressie	Scot of Galashiels
Macpherson of Pitmean, &c.	Scot of Harden and Synton
Macpherson of Phoness	Scot of Millenie
Macpherson of Strathmassie	Scot of Scotstarvet
Masterton of that Ilk, Parkmill, &c.	Senipill of Cathcart
Maxwell of Calderwood	Seton of Cariston
Maxwell of Pollock	Seton of Culbeg
Mayne of Powis	Seton of Pitmedden
Melville of Strathkinnes and Craigtown	Seton of Touch
Methven of that Ilk in Scotland, now represented by Methven of Corsham, in England	Sinclair of Barrack
Mitchel of Bandeth and Westshore, now of Mitchell	Sinclair of Lathrone, Dunbeath, and Brabster
Mitchelson of Middleton	Sinclair of Longformacus
Moncrieff of that Ilk	Sinclair of Mey
Montgomery of Macbeth-hill	Sinclair of Roslin
Monro of Foulis	Sinclair of Stevenson, now of Murkle
Moray of Bothwell and Abercairny	Skene of Skene, or of that Ilk
Murray of Arbenie	Smith of Braco and Methven
Murray of Aytoun	Smith of Glasswell and Camno
Murray of Blackbarony	Smith of Smithfield
Murray of Cringalty	Smyth of Balhary
Murray of Clermont and Newton	Spens of Lathallan
Murray of Dollary	Spens, Baron de, in France, 1st branch
Murray of Ochertyre	Spens, at Bourdeaux, in France, 2d branch
Murray of Stanhope	Spottiswoode of that Ilk
Murray of Touchadam and Pitlochrie	Stewart of Ballechin
Murray of Philiphaugh	Stewart of Killichassie, or Stewartfield
Murray of Pitcullen	Stewart of Castlemilk
Murray of Pitcaithly, Lintrose, &c.	Stewart of Grandtully
Neilson of Barncalzie	Stuart of Torrence
Ogilvie of Innercarity	Swinton of that Ilk
Ogilvie of Inchmartine, now representative of the Ogilvies of Boyne	Trotter of Mortonhall
Preston of Valleyfield	Urquhart of Byth
Pringle, or Hope-Pringle, of Whitebank	Urquhart of Craigston
Purves of that Ilk	Urquhart of Meldrum
Ramsay of Balmain	Vere of Blackwood
Ramsay of Banff	Walker of St Fort
Rattray of that Ilk, and Craighall	Wedderburn of Blackness
Riddle of Ardnamurchan, &c. &c. &c.	Wedderburn of Gosford
Riddle of Glenriddle	Wedderburn of Balindean
Riddle of Kinglass	Wemyss of Lathocker
	Wemyss of Bogie
	Whytt of Bennochy

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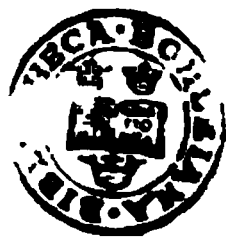
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WITH

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An APPENDIX has been added, containing an Inventory of Writs of the Earldom, and a Continuation of the succession of the Earls of Sutherland from 1651, to the present date.

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